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MILITARY TRIALS OF TERRORISTS: FROM THE LINCOLN CONSPIRATORS TO THE GUANTANAMO INMATES

Chief Justice Frank J. Williams (Ret.)*
Nicole J. Benjamin, Esq.**

I. INTRODUCTION

Military commissions, born of military necessity, have long been a feature of war. They are neither mentioned in the United States Constitution nor created by statute, but derive their authority from powers vested in both and are recognized by this nation as a vital aspect of war. Military commissions are special courts operated by the military, not the civilian judiciary and are used to adjudicate extraordinary cases during wartime.

During the Civil War, Attorney General James Speed justified the existence and purpose of military commissions. In a powerful explanation, he opined that “military tribunals exist under and according to the laws and usages of war, in...
the interest of justice and mercy. They are established to save human life, and to prevent cruelty as far as possible.\textsuperscript{3} Although Attorney General Speed was able to justify the existence of military commissions during the Civil War, the military commissions to which he referred were almost no comparison to those in place today. Today’s military commissions are noticeably distinct from the military commissions of the past, yet the stigma associated with them has carried forward to today. This article will demonstrate that military commissions are justified, authorized and, most importantly, fair. This article examines the evolution of military commissions from the dark days of the Civil War to our nation’s current war on terror. In so doing, this article will show the progression of military commissions from those totally lacking in procedural safeguards to those of today, which afford a full panoply of the rights that, overtime, we have come to understand are afforded under the Due Process clause of the Constitution. Part II of this article identifies the war powers afforded under the United States Constitution that have been viewed as a source of authority for the establishment of military commissions.\textsuperscript{4} Part III introduces the first United States military commissions that were established during the Mexican War.\textsuperscript{5} Part IV details the military commissions that were established as the Civil War was fought on United States soil and includes discussion on the Lieber Code.\textsuperscript{6} Part V sets forth the military commission trial of those accused of co-conspirators in President Abraham Lincoln’s assassination.\textsuperscript{7} Part VI details the military commissions of the Second World War.\textsuperscript{8} Part VII explains the institution of military commissions during the War on Terror.\textsuperscript{9} Part VIII brings the article to the present with its explanation of the military commissions that are currently being used to try those accused of terrorism.\textsuperscript{10}

\section*{II. War Powers as Authority for Establishment of Military Commissions}

The United States Constitution affords the government broad powers to protect and safeguard the United States during times of war.\textsuperscript{11} Military

\begin{itemize}
  \item \textsuperscript{3} Opinion of the Constitutional Power of the Military to Try and Execute the Assassins of the President, 11 Op. Att’y Gen. 297 (1865).
  \item \textsuperscript{4} \textit{See infra} Part II.
  \item \textsuperscript{5} \textit{See infra} Part III.
  \item \textsuperscript{6} \textit{See infra} Part IV.
  \item \textsuperscript{7} \textit{See infra} Part V.
  \item \textsuperscript{8} \textit{See infra} Part VI.
  \item \textsuperscript{9} \textit{See infra} Part VII.
  \item \textsuperscript{10} \textit{See infra} Part VIII.
\end{itemize}
commissions have been justified under nine separate provisions of the Constitution,\(^\text{12}\) in addition to the Define and Punish Clause.\(^\text{13}\)

Authority for military commissions often is justified pursuant to the Constitution’s War Powers.\(^\text{14}\) The United States Supreme Court has recognized that those war powers include:

> the power to wage war successfully. . . . Since the Constitution commits to the Executive and to Congress the exercise of the war power in all the vicissitudes and conditions of warfare, it has necessarily given them wide scope for the exercise of judgment and discretion in determining the nature and extent of the threatened injury or danger and in the selection of the means for resisting it.\(^\text{15}\)

It is these powers that are used to justify the establishment of military commissions to try persons for offenses against the law of war.\(^\text{16}\) Indeed, in the words of Colonel William Winthrop, who the United States Supreme Court has dubbed the “Blackstone of Military Law”\(^\text{17}\):

> it is those provisions of the Constitution which empower Congress to “declare war” and “raise armies,” and which, in authorizing the initiation of war, authorize the employment of all necessary and proper agencies for its due prosecution, from which this tribunal derives its original sanction. Its authority is thus the same as the authority for the

\(^{12}\) *Ex parte Quirin*, 317 U.S. 1, 25-26 (1942). ([O]ne of the objects of the Constitution, as declared by its preamble, is to “provide for the common defence.” As a means to that end, the Constitution gives to Congress the power to “provide for the common Defence,” Article I, Section 8, Clause 1; “To raise and support Armies,” “To provide and maintain a Navy,” Article I, Section 8, Clauses 12 & 13; and “To make Rules for the Government and Regulation of the land and naval Forces,” Article I, Section 8, Clause 14. Congress is given authority “To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water,” Article I, Section 8, Clause 11; and “To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations,” Article I, Section 8, Clause 10. And finally, the Constitution authorizes Congress “To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” Article I, Section 8, Clause 18. The Constitution confers on the President the “executive Power,” Article II, Section 1, Clause 1, and imposes on him the duty to “take Care that the Laws be faithfully executed.” Article II, Section 3. It makes him the Commander in Chief of the Army and Navy, Article II, Section 2, Clause 1, and empowers him to appoint and commission officers of the United States. Article II, Section 3, Clause 1).

\(^{13}\) *Hamdan*, 548 U.S. 557, 597 (2006) (Stevens, Souter, Ginsburg, and Breyer, JJ., concurring) (referring to Winthrop’s “Military Law and Precedents,” as “[t]he classic treatise penned by Colonel William Winthrope, whom we have called the ‘Blackstone of Military Law.’”).

\(^{14}\) *Hamdan*, 2011 U.S. CMCR LEXIS 1, at *33-34 (citing *Ex parte Quirin*, 317 U.S. 1, 26-31 (1942)).

\(^{15}\) Lichter v. United States, 334 U.S. 742, 767 n. 9 (1948) (citations omitted).

\(^{16}\) *Hamdan*, 2011 U.S. CMCR LEXIS 1, at *33-34 (citing *Ex parte Quirin*, 317 U.S. 1, 26-31 (1942)).
making and waging of war and for the exercise of military government and martial law. The commission is simply an instrumentality for the more efficient execution of the war powers vested in Congress and the power vested in the President as Commander-in-chief in war.18

III. MILITARY COMMISSIONS DURING THE MEXICAN WAR

The genesis of American military commissions dates back to the Mexican War of 1846-1848. Concerned about the lack of discipline and misconduct among American soldiers (especially volunteer soldiers), General Winfield Scott drafted an order that called for a declaration of martial law in Mexico.19 Scott was particularly troubled by the behavior of “wild volunteers” who, as soon as they crossed the Rio Grande, “committed, with impunity, all sorts of atrocities on the persons and properties of Mexicans.”20 Scott was well aware that such actions, if left undisciplined, could incite guerilla uprisings.21 In Scott’s thinking, if he could discipline American soldiers for such actions, he potentially could avert guerilla warfare.22 With martial law and military tribunals in place, a strong message would be sent to Mexican citizens and United States soldiers - misconduct by either side would result in “swift and severe punishment.”23

On February 19, 1847, Scott issued General Order No. 20, which proclaimed martial law and established military commissions for prosecution of a variety of offenses, including “murder, poisoning, rape, or the attempt to commit either; malicious stabbing or maiming; malicious assault and battery, robbery [and] theft.”24 Although these crimes were punishable under common law, American soldiers who committed such crimes on foreign soil went unpunished. There was “no legal punishment for any of those offences, for by the strange omission of Congress, American troops take with them beyond the limit of their own country, no law but the Constitution of the United States, and the rules and articles of war.”25 Crimes such as murder, rape and theft are not addressed by any of these authorities, and, therefore, they go unpunished no matter by whom, or when they are committed.26

Thus, Scott saw it necessary to create military commissions specially designed to try those on foreign soil.27 The military commissions established

18. WILLIAM WINTHROPE, MILITARY LAW AND PRECEDENTS 831 (2d ed. 1920).
20. Id. at 33 (citing 2 WINFIELD SCOTT, MEMOIRS OF LIEUT.-GENERAL SCOTT, LL.D. 392 (1864)).
21. Id. at 32.
22. Id.
23. Id. at 33.
24. 2 WINFIELD SCOTT, MEMOIRS OF LIEUT. GENERAL SCOTT, LL.D. 540-41 (1864).
25. Id. at 393.
26. Id.
27. Id.
during the Mexican War tried over 117 in Mexico. Although the majority of those tried were American soldiers, several officers of the Mexican army were tried by officers of the United States army and, upon convictions, were shot to death.

The tribunals were helpful in maintaining peace between United States soldiers and Mexican civilians. One American soldier was tried by military commission for drunkenly beating a Mexican woman. For this crime he received twelve lashes and confinement at hard labor, in ball and chain, for the remainder of the war. Another was hanged for having raped and robbed a Mexican woman.

The commissions did not operate in secrecy and contained procedural safeguards to ensure fairness. For example, the proceedings were recorded (using transcripts much like our modern day courts), reviewed, and either approved or disapproved.

IV. MILITARY COMMISSIONS DURING THE CIVIL WAR

Less than two decades after the war with Mexico, war took on a new meaning as it was fought on American soil, where the whole country was a war zone. This time, the justification for the use of military commissions was different. During the Mexican War military commissions were necessary because crimes committed by United States soldiers while on foreign soil could not be punished by United States courts because they lacked jurisdiction. However, that was not a problem during the Civil War. Although war Confederates – civilian and military – were subject to the jurisdiction of American courts, those courts that were loyal to the Confederates States of America could not be trusted and were, therefore, ill suited to try those who were guilty of disloyalty to the Union and the President. Civil offenses that could be tried by a loyal court would be so tried and the need for a military commission trial was unnecessary. Conversely, civil offenses that could not be tried by a loyal court were ripe for trial by military commission. This system was not perfect, however. Importantly, it failed to define the term “loyal” and due to the term’s ambiguity, any court could conceivably be deemed a disloyal court if it operated in a manner inconsistent with the Union.

After the Confederates had bombarded Fort Sumter in the Charleston Harbor in April 1861, newly elected President Abraham Lincoln called for

28. FISHER, supra note 19, at 35.
30. FISHER, supra note 19, at 34.
31. Id.
32. Id. at 35.
33. Id.
reinforcements to protect Washington, D.C.

The Civil War was underway and the nation’s capital was in jeopardy, given that it bordered Virginia, a secessionist state, and Maryland, whose threats to secede were widely known.

The Massachusetts militia soldiers endured horror as they passed through Baltimore, facing attacks by fellow citizens. Giving America a glimpse of that horror, The New York Times reported: “It is said there have been 12 lives lost. Several are mortally wounded. Parties of men half frantic are roaming the streets armed with guns, pistols and muskets ... a general state of dread prevails.”

In the days and weeks that followed, the city of Washington was virtually severed from the states of the North. Troops stopped arriving, telegraph lines were slashed, and postal mail from the North reached the city only infrequently.

Lincoln immediately perceived the grave danger that the war would be lost if the Confederates seized the capital or caused it to be completely isolated. Prompted by the urging of Secretary of State William H. Seward, Lincoln, a former attorney, concluded that it was necessary to suspend the Great Writ of habeas corpus. Although Congress was in recess, Lincoln, relying on the constitutional authorization that the framers had perceptively included years before, authorized General Winfield Scott to suspend the writ, believing that his presidential duty to protect the capital and the Union required such an action.

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34. See also Abraham Lincoln: A Documentary Portrait Through His Speeches and Writings 160-62 (Don E. Fehrenbacher ed., 1964). Responding to the fact that Confederate troops had opened fire on Fort Sumter, Lincoln called out the militia of the several states of the Union and convened a special session of Congress.


37. Id.


43. Rehnquist, supra note 39, at 23 (quoting A Day with Governor Seward at Auburn, reprinted in F.B. Carpenter, Seward Papers, No. 6634 (July 1870)).

44. On April 27, 1861 Abraham Lincoln reluctantly ordered General Winfield Scott to suspend habeas corpus where necessary to avoid the overthrow of the government and to protect the nation’s capital:

To The Commanding General of the Army of the United States:

You are engaged in suppressing an insurrection against the laws of the United States. If at any point on or in the vicinity of any military line which is now or which shall be used between the city of Philadelphia and the city of Washington you find resistance which renders it necessary to suspend the writ of habeas corpus for the public safety, you personally, or through the officer in
The effect enabled military commanders to arrest and detain individuals indefinitely in areas where martial law had been imposed. Many of those detained were individuals who attempted to halt military convoys. Lincoln saw that immediate action and a declaration of martial law was necessary to divest civil liberties from those who were disloyal and whose overt acts against the United States threatened its survival without the rights explicit in our usual judicial process.

To Lincoln, there was no tolerable middle road. He was acutely aware that some citizens would sharply criticize him for suspending the Great Writ. The alternative, however, was far worse in his estimation. In Lincoln’s judgment nothing would be worse than allowing the nation to succumb to Confederate forces. Even some of those who deemed Lincoln’s actions unconstitutional have noted the real-world emergency with which he was faced. One commentator has noted: “Lincoln’s unconstitutional acts during the Civil War show that even legality must sometimes be sacrificed for other values. We are a nation under law, but first we are a nation.”

Lincoln’s actions were challenged through the judicial process and, ultimately, United States Supreme Court Chief Justice Roger Brooke Taney authored Ex parte Merryman, in which he opined that Congress alone had the power to suspend the writ of habeas corpus. Unfortunately for Chief Justice Taney, his words carried no precedential value as an in-chambers opinion. Chief Justice Taney recognized this but forwarded his in-chambers opinion to President Lincoln. Ironically, it was Taney who, only a month before, had

command at the point where resistance occurs, are authorized to suspend the writ.

ABRAHAM LINCOLN.


45. LIND, supra note 39.

46. LINCOLN IN THE TIMES, supra note 36, at 117.


50. Typically, a Circuit Justice would either grant or deny the application before him. Occasionally, however, Circuit Justices would issue an in chambers opinion explaining the reasons for their decisions. Cynthia J. Rapp, In Chambers Opinions by Justices of the Supreme Court, 5 GREEN BAG 2D 181, 182 (2002). These opinions were typically brief and were not circulated to the full court before release. Id.

51. DANIEL FARBER, LINCOLN’S CONSTITUTION 17 (2003); see also JEFFREY ROSEN, THE SUPREME COURT: THE PERSONALITIES AND RIVALRIES THAT DEFINED AMERICA 12 (2007) (stating that “Taney went out of his way to mock the president, circulating his opinion as widely as possible to embarrass the administration.”).
administered the President’s oath,\textsuperscript{52} which the President now relied upon to justify his actions.

If one thing is certain, it is that Chief Justice Taney’s opinion did not deter Lincoln. Rather, Lincoln turned to Attorney General Edward Bates for confirmation that his decision to suspend habeas corpus was within his authority.\textsuperscript{53} Bates responded as follows:

\begin{quote}
I am clearly of opinion that, in a time like the present, when the very existence of the nation is assailed, by a great and dangerous insurrection, the President has the lawful discretionary power to arrest and hold in custody persons known to have criminal intercourse with the insurgents, or persons against whom there is probable cause for suspicion of such criminal complicity.\textsuperscript{54}
\end{quote}

Disregarding the in chambers opinion of Chief Justice Taney, Lincoln boldly broadened the scope of the suspension of the writ.\textsuperscript{55} In the draft of Lincoln’s report to Congress (the only extant copy of his July 4, 1861 speech),\textsuperscript{56} he passionately defended his position:

\begin{quote}
The provision of the Constitution that “the privilege of habeas corpus, shall not be suspended unless when, in cases of rebellion or invasion, the public safety may require it,” is equivalent to a provision - is a provision - that such privilege may be suspended when, in cases of rebellion, or invasion, the public safety does require it. It was decided that the public safety does require the qualified suspension of the privilege of the writ which was authorized to be made. Now it is insisted that Congress, and the Executive, is vested with this power. But the Constitution itself, is silent as to which, or who, is to exercise the power; and as the provision was plainly made for a dangerous emergency, it cannot be believed that the framers of the instrument intended, that in every case, the danger should run its course, until Congress could be called together; the very assembling of which might be prevented, as was intended in this case, by the rebellion . . .
\end{quote}

\begin{footnotes}
\textsuperscript{52} See BRIAN McGINTY, LINCOLN AND THE COURT (2008).
\textsuperscript{54} 10 OFFICIAL OPINIONS OF THE ATTORNEY GENERAL OF THE UNITED STATES, ADVISING THE PRESIDENT AND HEADS OF DEPARTMENTS IN RELATION TO THEIR OFFICIAL DUTIES 81 (W.H. & O.H. Morrison 1868).
\textsuperscript{56} No official copy of Lincoln’s speech of July 4, 1861 has been found. The cited text is Lincoln’s second proof, which contains his final revisions. See \textit{4 The Collected Works of Abraham Lincoln} 421, n.1 (Roy P. Basler ed., Rutgers Univ. Press 1953).
\end{footnotes}
whole of the laws which were required to be faithfully executed, were being resisted, and failing of execution, in nearly one-third of the States. Must they be allowed to finally fail of execution? ... Are all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated?57

Lincoln explained that his actions were not only justified, but were required of him pursuant to his oath to preserve, protect, and defend the Constitution of the United States.58 In August 1861, Congress ratified the President’s actions in all respects.59

That same year the first military commissions were convened. Initially, trials took place in Virginia where United States soldiers charged with common law crimes were tried.60 It was thought that such trials would serve as a deterrent for future misconduct.61 Particularly it targeted United States soldiers who had perpetrated crimes on one another or upon civilians.62 Military commission trials also commenced in Missouri in 1861. Thirty three individuals – mostly civilians – were brought before the commissions that year, most of whom were charged with treason against the government.63 Although many were either acquitted or released, twelve were convicted and sentenced to hard labor for the duration of the war.64

Later that year, in August 1861, General John C. Fremont declared martial law in Missouri, purportedly giving him the authority to try by court martial all persons captured bearing arms.65 In Fremont’s estimation, the circumstances in Missouri were of “sufficient urgency to render it necessary that the commanding general of this department should assume the administrative powers of the

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58. Id. (Lincoln’s actual words were: “Even in such a case, would not the official oath be broken, if the government should be overthrown, when it was believed that disregarding the single law, would tend to preserve it?”). See also JAMES M. MCPHERSON, THIS MIGHTY SCOURGE: PERSPECTIVES ON THE CIVIL WAR 211 (2007) (noting that Lincoln’s argument that military courts cannot try civilians outside the war zone was that the whole country was a war zone). The oath that every president must take before entering on the execution of that high office is explicitly set forth in Article II, Section 1 of the Constitution. It should also be recalled that the Preamble to the Constitution specifically states that providing “for the common defence” and “securing the blessings of liberty” are among the goals which the Constitution is intended to serve.
59. Act of August 6, 1861, ch. 63, § 3, 12 Stat. 326. Although this language did not expressly ratify the President’s suspension of habeas corpus, it was widely understood as having done so.
61. Id.
62. Id.
63. Id.
64. Id.
Fremont described the conditions he observed as disorganized, lacking in civil authority, and replete with bands of murders and marauders who were devastating property. Fremont believed that “public safety and success of [the Union’s] arms require[d] unity of purpose.” Therefore, Fremont declared martial law to “suppress [such] disorders, maintain the public peace and give security to persons and property of loyal citizens.” Fremont proclaimed that all persons found guilty of bearing arms within certain prescribed territory “will be shot.”

Importantly, Fremont noted that the object of his declaration was:

[T]o place in the hands of military authorities power to give instantaneous effect to the existing laws . . . but it [was] not intended to suspend the ordinary tribunals of the country where law will be administered by civil officers in the usual manner and with their customary authority while the same can be peaceably administered.

Upon receiving word of Fremont’s proclamation, Lincoln acted immediately, instructing Fremont that no one should be shot without his consent. Lincoln feared - and correctly so - that shooting Confederates in these circumstances could lead to further insurrection and the shooting of Union soldiers. Lincoln wrote to Fremont:

Two points in your proclamation of August 30th give me some anxiety. First, should you shoot a man, according to the proclamation, the Confederates would very certainly shoot our best man in their hands in retaliation; and so, man for man, indefinitely. It is therefore my order that you allow no man to be shot, under the proclamation, without first having my approbation or consent.

With Fremont’s order in place, military commission trials began and focused on trying individuals - mostly civilians - who were caught bearing arms, sabotaging infrastructure - mostly railroad tracks and telegraph lines - or recruiting or enlisting Confederate forces. The effect of Fremont’s proclamation declaring martial law was unclear. On November 20, 1861, Halleck sent a telegraph to McClellan, which read: “No written authority is found here to declare and enforce martial law in this department. Please send me

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66. Id.
67. Id.
68. Id.
69. Id.
70. Id.
71. Id. at 222.
73. Id.
74. LOUIS FISHER, MILITARY TRIBUNALS AND PRESIDENTIAL POWER: AMERICAN REVOLUTION TO THE WAR ON TERRORISM 46 (2005).
such written authority and telegraph me that it has been sent by mail.”75 On November 21, 1861, Lincoln responded to this request with one simple statement: “If General McClellan and General Halleck deem it necessary to declare and maintain martial law at Saint Louis the same is hereby authorized. A. LINCOLN.”76 Having not received the President’s message, on November 30, 1861, Halleck again informed McClellan that without the requested authorization, “I cannot arrest such men and seize their papers without exercising martial law for there is no civil law or civil authority to reach them . . . . if the President is not willing to intrust [sic] me with it he should relieve me from the command. . . .”77 To this Lincoln responded:

General: As an insurrection exists in the United States and is in arms in the State of Missouri, you are hereby authorized and empowered to suspend the Writ of Habeas Corpus within the limits of the military division under your command and to exercise martial law as you find it necessary in your discretion to secure the public safety and the authority of the United States.78

With the climate in Missouri worsening, on December 26, 1861, Halleck declared martial law in Saint Louis.79 Hallack’s order read:

In virtue of the authority conferred in me by the President of the United States, martial law, heretofore issued in this city, will be enforced. In virtue of authority, martial law is hereby declared and will be enforced in and about all the railroads in this State. It is not intended by this declaration to interfere with the jurisdiction in the court which is loyal to the Government of the United States, and which will aid the military authorities in enforcing order and punishing crimes.80

Although Halleck was quick to note that his order was not intended to interfere with the jurisdiction of civil courts, like many military officers he had little trust for the civil court system. In a letter to the Hon. Thomas T. Ewing, one of Ohio’s delegates to a peace conference designed to stave off the Civil War, Halleck wrote, “[t]he civil courts can give us no assistance as they are very generally unreliable.”81 In Halleck’s estimation, “[t]here [was] no alternative but

75. 5 THE COLLECTED WORKS OF ABRAHAM LINCOLN 27 (Roy P. Basler ed., Rutgers Univ. Press 1953).
76. Id.
77. Id.
78. Id. at 35.
80. Id.
81. THE WAR OF THE REBELLION, supra note 65, at 247.
to enforce martial law.”

A general order communicated from Halleck’s headquarters later that day stated:

Crimes and military offenses are frequently committed which are not triable or punishable by courts-martial and which are not within the jurisdiction of any existing civil court. Such cases, however, must be investigated and the guilty parties punished. The good of society and the safety of the army imperiously demand this. They must therefore be taken cognizance of by the military power.”

However, “civil offenses cognizable by civil courts whenever such loyal courts exist will not be tried by a military commission.”

As the Civil War progressed and while the Union and Confederate armies fought on the battlefield, a sideshow of guerilla-style hit and run attacks began to develop. Like the Mexican War, many officers were volunteers and knew little about the laws of war, which led to the rise of guerilla warfare. In recognition of the increasing problem of guerilla warfare, in August 1862, Major General Henry Halleck, who was then the General-in-Chief of the Union Army, engaged Dr. Francis Lieber, a political philosopher and a political science professor who had immersed himself in the study of early nineteenth century warfare, to craft instructions on how soldiers should conduct themselves in wartime.

Interestingly, three of Lieber’s sons fought in the war – two for the North and one for the South. Halleck explained to Lieber the problem of whether such guerillas should be treated as ordinary belligerents and be given the same rights as prisoners of war. In response, Dr. Lieber drafted a pamphlet entitled, “Guerilla Parties Considered with Reference to the Laws and Usages of War,” in which he defined “guerrilla party” as “an irregular band of armed men, carrying on an irregular war, not being able, according to their character as a guerrilla party, to carry on what the law terms a regular war.” Dr. Lieber explained that “[t]he irregularity of the guerrilla party consists in its origin, for it is either self-constituted or constituted by the call of a single individual, . . . and it is irregular as to the permanency of the band, which may be dismissed and called again together at any time.” In Dr. Lieber’s opinion, guerilla parties, due to the nature in which they operate, do not enjoy all of the protections of the law of war because they “cannot encumber themselves with prisoners of war; they have, therefore, frequently, perhaps generally, killed their prisoners . . . thus

82. Id.
83. Id.
84. Id. at 248.
85. Fisher, supra note 74, at 72. Lieber’s son Oscar, who fought for the Confederacy, died in battle. Lieber once remarked that he had known war as a soldier and as a wounded man, “but I had yet to learn it in the phase of a father searching for his wounded son, walking through the hospitals, peering in the ambulances.” Id. (citing Frank Freidel, Francis Lieber Nineteenth-Century Liberal 325 (1947)).
87. Id. at 33.
introducing a system of barbarity which becomes [more intensive] in its
demoralization as it spreads and is prolonged.88

Dr. Lieber’s Guerrilla Parties Considered with Reference to the Laws and
Usages of War, set the stage for his next contribution as the primary author of
“Instructions for the Government of Armies of the United States in the Field,”
which was released as Army General Order 100, and is now commonly referred
to as the Lieber Code. On April 24, 1863, President Lincoln approved what Dr.
Lieber had written and directed that it be published. The Lieber Code was the
first comprehensive list of instructions on the laws of war. The instructions
included ten sections and 157 articles.89 The sections ranged from martial law
to property of the enemy and insurrection. The code was intended to be malleable
enough so that wars could be won but also included more rigid standards
designed to reflect basic human dignity.

In the wake of the Lieber Code, military commissions sprang up across the
United States. Unlike those utilized during the Mexican war, the military
commissions of the civil war were designed to try civilians. By mid-1862, nearly
two bloody years had passed since the onset of the Civil War. Political conflicts
rioted the nation, driving both sides to fight fiercely for a cause in which each
strongly believed. Despair cast a dark cloud over the country, and causalities
would reach over 200,000 by the start of the next year.90 As the Civil War
droned on, on September 24, 1862, Lincoln, like Gen. Scott during the Mexican
War, saw it necessary to convene military tribunals. Responding to the grave
political and military climate, Lincoln issued a proclamation which declared
martial law and authorized the use of military tribunals to try civilians within the
United States believed “guilty of disloyal practice” or who “afforded aid and
comfort to Rebels.”91 The following March, Lincoln appointed Major General
Ambrose Burnside as commanding general of the Department of the Ohio.92
After only one month in that position, Burnside issued General Order No. 38,
authorizing imposition of the death penalty for those who aided the Confederacy
and who “declared sympathies for the enemy.”93

With this order as justification, and at Gen. Burnside’s direction, 150 Union
soldiers arrived at the home of anti-war former congressman Clement L.

88. Id.
89. Francis Lieber, Instructions for the Government of Armies of the United States in
    The Field (The Lawbook Exchange, Ltd. 2005).
90. American Civil War, Battle Statistics, Commanders and Causalities,
91. See Proclamation Suspending the Writ of Habeas Corpus (Sept. 24, 1862), reprinted in 5
    1953).
92. See Michael Kent Curtis, Lincoln, Vallandigham, and Anti-War Speech in the Civil War, 7
93. General Order No. 38, as reprinted in Benjamin Perley Poore, The Life and Public
    Services of Ambrose E. Burnside, Soldier-Citizen-Statesman 206-07 (1882).
Vallandigham in Dayton, Ohio at 2:40 a.m. on May 5, 1963.94 When Vallandigham refused to let the soldiers in, they broke down his front door and forced their way inside.95 Vallandigham was arrested for a public speech he delivered in Mount Vernon, which lambasted President Lincoln, referred to him as a political tyrant, and called for his overthrow.96 Vallandigham was escorted to Kemper Barracks, a military prison in Cincinnati.97

Specifically, Vallandigham was charged with having proclaimed, among other things, that "the present war was a wicked, cruel, and unnecessary war, one not waged for the preservation of the Union, but for the purpose of crushing out liberty and to erect a despotism; a war for the freedom of the blacks and the enslavement of the whites."98

Although he was a United States citizen who would ordinarily be tried for criminal offenses in the civilian court system, Vallandigham was tried before a military tribunal a day after his arrest.99 Vallandigham, an attorney, objected that trial by a military tribunal was unconstitutional, but his protestations to the Lincoln administration fell on deaf ears.100 The military tribunal found the Ohio "Copperhead"101 in violation of General Orders No. 38 and ordered him imprisoned until the war's end.102 Subsequent to this sentence, Vallandigham petitioned the United States Circuit Court sitting in Cincinnati for a writ of habeas corpus, which, perhaps much to Chief Justice Taney's dismay, was denied.103 In a final attempt, Vallandigham petitioned the United States Supreme Court for a writ of certiorari, but his petition to the Court was unsuccessful, the court ruling that it was without jurisdiction to review the military tribunal’s

94. Curtis, supra note 92, at 105, 107, 122; see also Vallandigham Arrested, ATLAS & ARGUS, May 6, 1863.
95. Id. at 107.
96. BENJAMIN PERLEY POORE, THE LIFE AND PUBLIC SERVICES OF AMBROSE E. BURNSIDE, SOLDIER-CITIZEN-STATESMAN 208 (1882); REHNQUIST, supra note 41, at 65-66.
97. POORE, supra note 96, at 208-09; REHNQUIST, supra note 41, at 65-66.
98. Ex parte Vallandigham, 68 U.S. 243, 244 (1864).
99. Id.; see Curtis, supra note 92, at 121.
100. Vallandigham, 68 U.S. at 246.
101. Copperheads were Northern Democrats who sided with the South and opposed the Civil War. Republicans dubbed such war opponents Copperheads because of the copper liberty-head coins they wore as badges. 1 ENCYCLOPEDIA OF THE AMERICAN CIVIL WAR: A POLITICAL, SOCIAL, AND MILITARY HISTORY 498-99 (David S. Heidler & Jeanne T. Heidler eds., 2000). The term Copperhead was "borrowed from the poisonous snake of the same name that lies in hiding and strikes without warning. However, 'Copperheads' regarded themselves as lovers of liberty, and some of them wore a lapel pin with the head of the Goddess of Liberty cut out of the large copper penny minted by the Federal treasury." FRANK J. WILLIAMS, ABRAHAM LINCOLN AND CIVIL LIBERTIES IN WARTIME, HERITAGE LECTURES 5, n.18 (May 5, 2004), available at http://www.heritage.org/Research/lecture/abraham-lincoln-and-civil-liberties-in-wartime.
103. Id. at 37-39, 272.
Although it declined to take up Vallandigham’s case, the Court offered some perspective on its view of the merits of Vallandigham’s case. The Court suggested that the Lieber Code was dispositive of the matter and that the general who arrested Vallandigham had acted in conformity with the Code. In so suggesting, the Court noted the Lieber Code’s recognition that military commission jurisdiction was “applicable, not only to war with foreign nations, but [also] to rebellion.”

Not surprisingly, the trial of Vallandigham by a military tribunal subjected Lincoln to yet more criticism. His critics bemoaned his decision, deeming it “a palpable violation of the ... Constitution.” Lincoln insisted, however, that civilians captured away from the battlefield could lawfully be tried by a military tribunal because the whole country, in his opinion, was a war zone. Lincoln further defended his suspension of habeas corpus:

If I be wrong on this question of constitutional power, my error lies in believing that certain proceedings are constitutional when, in cases of rebellion or Invasion, the public Safety requires them ... The constitution itself makes the distinction; and I can no more be persuaded that the government can constitutionally take no strong measure in time of rebellion, because it can be shown that the same could not be lawfully taken in time of peace, than I can be persuaded that a particular drug is not good medicine for a sick man, because it can be shown to not be good food for a well one.

President Lincoln, concerned about the harshness of Vallandigham’s punishment and the potential criticism over Vallandigham’s arrest, detention, and trial by military tribunal, commuted his sentence to banishment to the Confederacy.

In 1866, the war having ended, the Supreme Court was called upon to consider the legality of Lincoln’s suspension of habeas corpus and his use of military tribunals. The Supreme Court, upon which Taney no longer sat, proceeded to conclude, as Taney had in Merryman, that the President could not

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104. Vallandigham, 68 U.S. at 251.
105. Id. at 249.
106. Id.
108. JAMES M. McPHERSON, THIS MIGHTY SCOURGE: PERSPECTIVES ON THE CIVIL WAR 217 (2007) (noting that Lincoln’s oath imposed a larger duty that “overrode his obligation to heed a lesser specific provision in the Constitution”).
110. See Curtis, supra note 92, at 121. The Confederacy was not happy to see Vallandigham, who made his way to Winsor, Ontario, opposite Ohio, where he ran unsuccessfully for Governor of Ohio.
111. Ex parte Milligan, 71 U.S. 2, 108-09 (1866).
unilaterally suspend the writ of habeas corpus.112 The Court also held that citizens captured off the battlefield could only be properly tried in a civilian court and not by a military tribunal.113

On October 5, 1864, Lambdin P. Milligan, a lawyer and Indiana citizen, was arrested by the military commander for that military district.114 Although Milligan was not captured on the battlefield, he was tried by a military commission and sentenced to death even though the civilian courts were functioning in Indiana.115 Before the sentence was carried out, Milligan petitioned the Circuit Court of the United States for the District of Indiana for a writ of habeas corpus.116 The Circuit Court certified the question to the Supreme Court, which assumed jurisdiction and issued the writ.117

The Supreme Court reasoned that the suspension of habeas corpus was permissible, but that such a suspension did not apply to Milligan because he had not joined the Confederate forces and was captured away from the battlefield in an area where civilian courts were still operating.118 According to the Court, Milligan was simply a person who was ideologically aligned with the Confederates and not an enemy combatant who should be tried by a military tribunal.119 Therefore, Milligan could only be properly tried in a civilian court and not by a military tribunal.120

Milligan did make clear, however, that the right of American citizens to seek a writ of habeas corpus may be suspended during wartime so long as those citizens have joined enemy forces or have been captured on the battlefield. Indeed, without such a ruling, “the Union could not have fought the Civil War, because the courts would have ordered President Lincoln to release thousands of Confederate prisoners of war and spies.”121

In total, during the Civil War, the Union Army conducted at least 4,271 trials of U.S. citizens by military commission and another 1,435 during the reconstruction period that followed.122 Most of those tried by military commission were charged with guerilla activity, horse stealing, and bridge-burning.123 The issue to be decided by those who presided over the military commission was not whether the prisoner was guilty or innocent, but rather, whether the prisoner was under the orders of a regularly organized military unit

112. Id. at 139-40.
113. Id. at 121-22.
114. The Milligan Case 64 (Samuel Klaus, ed., Gaunt, Inc. 1997).
116. Id. at 107-09.
117. Id. at 110-11.
118. Id. at 127, 131.
119. Id. at 131.
120. Id.
121. John Yoo, War by Other Means: An Insider’s Account of the War on Terror 146 (2006).
These military commission trials, unlike those today, lacked procedural safeguards and the guarantees of due process. Prisoners languished without trial by military commission or otherwise. The trials were described as lacking the appearance of impartiality and exhibiting vengeance; and in the summer of 1863, the army developed a form of water torture that was widely used.

Nevertheless, a presidential check on the military commission system was prominent in the Lincoln Administration. President Lincoln personally reviewed certain cases that came before the military commissions during the Civil War. After the Sioux uprising in Minnesota that killed hundreds of white settlers in 1862, the military court had sentenced 303 Sioux to death. These cases came before Lincoln to review as final judge. Yet, despite great pressure to approve the verdicts, Lincoln ordered that the complete records of the trial be sent to him. Working deliberately, Lincoln reviewed each case, one-by-one. For a month, Lincoln carefully worked through the transcripts to sort out those who were guilty of serious crimes. Ultimately, Lincoln commuted the sentences of 265 defendants, and only thirty-eight of the original 303 were executed.

Although Lincoln was criticized for this act of clemency, he responded, “I could not afford to hang men for votes.”

V. MILITARY COMMISSIONS TO TRY THE LINCOLN ASSASSINATION CONSPIRATORS

In the wake of President Lincoln’s assassination and the attempted murder of Secretary of State William H. Seward, on May 1, 1865, President Andrew Johnson authorized the establishment of a military commission to try those accused of these crimes and of conspiring to assassinate other government officers.

President Johnson ordered nine military officers to serve on a commission, which became known as the Hunter Commission, to try those suspected of conspiring to assassinate President Lincoln. Pursuant to the President’s order, the tribunal convened eight days later to try David Herold, G. A. Atzerodt, Lewis

124. Id.
126. NEELY, supra note 123, at 110.
128. Id.
129. Id.
130. Id.
131. Id.
132. DONALD, supra note 127.
133. Id.
134. Id. at 394-95.
Payne, Mary Surratt, Michael O’Laughlin, Edward Spangler, Samuel Arnold, and Dr. Samuel A. Mudd. Each was charged with conspiring with intent to kill President Lincoln, Vice President Johnson, Secretary of State William H. Seward, and Gen. Ulysses S. Grant.

Joseph Holt, the Judge Advocate General of the Army, led the prosecution team. All of the alleged conspirators were represented by counsel before the commission and were afforded the right to call witnesses in their defense.

One commissioner, Major General C. B. Comstock, was unhappy at the first meeting on May 8, 1865. He was upset that the court was to meet in secret, and believed that the defendants should be tried in a civilian court. During the next day’s session, he raised those issues.136 Holt responded that the Attorney General had decided they had jurisdiction.137 On the next morning, when Comstock appeared at the court, he, as well as another officer unhappy with the prospect of a military trial of civilians, received an order relieving both from their assignments.138 Later that day, Stanton sent word through General Ulysses S. Grant that the action represented no reflection on the officers, but that there may have been a conflict as both men were members of Grant’s staff, and the General, too, had been an object of the assassination.139 The secret sessions only lasted until May 13, when, responding to pressure in the press, President Johnson ordered the trial opened to the public.140

The trial itself displayed little evidence of a presumption of innocence of the accused and strict impartiality on the part of the judges.141 From the beginning, members of the military commission presumed the accused to be guilty. In their first appearance in court the accused were chained and their faces almost entirely covered with black linen masks.142

The military officers comprising the court displayed their prejudice on several occasions. When Confederate General Edward Johnson was called to testify, one officer on the commission moved that Johnson be “ejected from the court as an incompetent witness on account of his notorious infamy.”143 Because Johnson had been educated at West Point and then had resigned from the Army and borne arms against the United States, he appeared before the court with hands “red with the blood of his loyal countrymen.”144 The motion to oust him

136. Id. at 315.
137. Id.
138. Id.
139. Id.
142. PITCH, supra note 135, at 314.
144. Id.
was seconded, but before Johnson could be removed, Judge Advocate Joseph
Holt intervened. 145 He advised the commission that the “rule of law” would not
authorize the court to declare the ex-Confederate an incompetent witness,
“however unworthy of credit he may be.” 146 Holt was also obliged to intervene
when a member of the court challenged the right of Maryland Senator Reverdy
Johnson to appear as counsel for one of the defendants. After some debate the
commission allowed a stunned Senator Johnson to represent his client.

Nevertheless, Holt presented testimony that had nothing to do with the
charges against the defendants but would serve to influence adversely the judges
and the public at large against the Confederacy and the defendants. Evidence
was introduced that concerned plots by the Confederate Secret Service to stage
raids from Canada on United States cities, the attempt to burn New York City,
and the effort to spread disease throughout the Union Army by use of
contaminated clothing. 147 Perhaps most unfair of all, the government introduced
witnesses and evidence dealing with the starvation of federal Army prisoners at
Libby, Belle Isle, and Andersonville prisons. 148 The chained and hooded
prisoners accused of complicity in the murder of President Lincoln were
somehow connected with these atrocities, if one could believe Holt. Over 350
witnesses testified in the conspirators’ trial, a more generous number than many
defendants would be afforded by civilian courts today. 149

During the attorneys’ closing statements, Reverdy Johnson challenged the
right of the military to sit in judgment of the eight defendants. 150 The
Constitution allowed the writ of habeas corpus to be suspended, but in no way
permitted the suspension of other rights belonging to the accused. The
Constitution and the laws determined which courts would try civilians. But the
defendants in the Lincoln conspiracy trial were doomed. The Judge Advocates
strongly influenced the decisions of the untrained military officers.

Using the printed transcript of the fifty-three day trial, Professor Joe George
found that either the Judge Advocate or the Special Judge Advocate, John A.
Bingham, raised objections to evidence introduced by the defense on thirty-four
occasions. 151 In all instances the objections were sustained. 152 Defense attorneys
raised objections fifteen times. They were overruled on thirteen occasions. 153

145. Id.
146. Id.
147. BEN PITMAN, compl., THE ASSASSINATION OF PRESIDENT LINCOLN AND THE TRIAL OF THE
148. Id.
149. See generally id.
150. THE TRIAL OF THE ASSASSINS AND CONSPIRATORS AT WASHINGTON CITY, D.C., MAY AND
JUNE 1865 FOR THE MURDER OF PRESIDENT ABRAHAM LINCOLN 158 (1865).
152. Id.
153. Id.
When the military officers, along with Holt and Bingham, deliberated the fate of the defendants behind closed doors at the end of the trial, the Judge Advocates were persevering and wanted all eight defendants hanged, according to General A.V. Kautz, one of the judges. The commission voted, however, to condemn four to the gallows and the remaining four to prison terms. The Judge Advocates were also quite surprised when five of the officers sitting on the commission signed a paper recommending clemency for Mary E. Surratt, one of the defendants sentenced to be hanged.

The next step was for the Judge Advocate General to take the commission’s findings either to the Secretary of War, or, as in this instance, to the President himself, as capital offenses were involved. As customary, Judge Holt added a statement of his own to the court record, for the benefit of his superiors. In this case Holt made a slight, but significant change in this procedure.

In two military trials before July, 1865, Holt specifically included in his comments accompanying the records sent to the President, information that the commissions had found the defendants guilty, but had also recommended clemency. Holt’s note to President Johnson dealing with the conviction of the Lincoln conspirators, however, urged the President to approve the findings of the court, saying nothing of the recommendation for clemency on behalf of Mrs. Surratt.\footnote{154} Holt wrote:

\begin{quote}
Having been personally engaged in the conduct of the foregoing case, . . . I deem it unnecessary to enter . . . into an elaborate discussion of the immense mass of evidence submitted to the consideration of the court. After a trial continuing for fifty-three days, in which between three and four hundred witnesses were examined for the prosecution and defense, and in which the rights of the accused were watched and zealously guarded by seven able counsel of their own selection, the commission have arrived at the conclusions presented above . . . .

The opinion is entertained that the proceedings were regular, and that the findings of the commission were fully justified by the evidence. It is thought that the highest consideration of public justice, as well as the future security of the lives of the officers of the government, demand that the sentences based on these findings, should be carried into execution.\footnote{155}
\end{quote}

Holt later insisted that he had included the clemency petition with the trial record when he delivered the documents to the President, while Johnson claimed that he never saw the petition. Whether or not Holt included the request for clemency, he should have informed the President of that fact in his covering

\footnote{154. Elizabeth Steger Trindal, Mary Surratt: An American Tragedy 203 (1996).}
\footnote{155. Robert Watson Winston, Andrew Johnson, Plebeian and Patriot 288-289 (1928).}
statement, as he had done on previous occasions. His failure to do so was a serious dereliction of duty.

The trial resulted in convictions and four were sentenced to death by public hanging and four others received prison sentences. On the morning of the scheduled executions, lawyers for Mary Suratt, who was sentenced to death, sought and received a writ of habeas corpus from United States District Court Judge Andrew Wylie. However, that writ was almost immediately suspended by President Johnson. Following the instructions of the President, General Winfield Scott Hancock, accompanied by Attorney General James Speed, returned the writ and refused to surrender Mrs. Suratt. When Hancock refused to give up his prisoner, Judge Wylie declared himself powerless to take any further action. Subsequently, four of the conspirators - Herold, Atzerodt, Payne and Suratt - were executed on July 7, 1865.

Two months after the commissions were convened and after the executions of the conspirators, President Johnson asked Speed for a legal opinion on whether the persons charged could be tried before a military tribunal. In response to President Johnson’s request, Speed delivered to the President what was titled “Opinion on the Constitutional Power of the Military To Try and Execute the Assassins of the President.” Setting the stage for his analysis, Attorney General Speed set forth the relevant facts:

The President was assassinated at a theater in the city of Washington. At the time of the assassination a civil war as flagrant, the city of Washington was defended by fortifications regularly and constantly manned, the principal police of the city was by Federal soldiers, the public offices and property in the city were all guarded by soldiers, and the President’s House and person were, or should have been, under the guard of soldiers. Martial law had been declared in the District of Columbia, but the civil courts were open and held their regular sessions, and transacted business as in times of peace.

Against this backdrop, Attorney General Speed began his analysis by recognizing the importance of the question to which he was called upon to opine. Speed acknowledged that the issue implicated the clash between citizens’ constitutional guarantees and the security of the army and government during a time of war. Nevertheless, Speed offered his opinion “that the conspirators not only may but ought to be tried by a military tribunal.” According to Speed,

158. Id.
159. Id.
160. Id.
[a] military tribunal exists under and according to the Constitution in time of war. Congress may prescribe how all such tribunals are to be constituted, what shall be their jurisdiction, and mode of procedure. Should Congress fail to create such tribunals, then, under the Constitution, they must be constituted according to the laws and usages of civilized warfare. They may take cognizance of such offences as the laws of war permit; they must proceed according to the customary usages of such tribunals in time of war, and inflict such punishments as are sanctioned by the practice of civilized nations in time of war.

The legitimate use of the great power of war, or rather the prohibitions against the use of that power, increase or diminish as the necessity of the case demands. When a city is besieged and hard pressed, the commander may exert an authority over the non-combatants which he may not when no enemy is near. . . . Military tribunals exist under and according to the laws and usages of war, in the interest of justice and mercy. They are established to save human life, and to prevent cruelty as far as possible. The commander of an army in time of war has the same power to organize military tribunals and execute their judgments that he has to set his squadrons in the field and fight battles. His authority in each case is from the laws and usages of war.

That the laws of war authorized commanders to create and establish military commissions, courts or tribunals, for the trial of offenders against the laws of war, whether they be active or secret participants in the hostilities, can not be denied. That the judgments of such tribunals may have been sometimes harsh, and sometimes even tyrannical, does not prove that they ought not to exist, nor does it prove that they are not constituted in the interest of justice and mercy.

Speed also recognized what war would look like without the ability to convene military commissions:

War in its mildest form is horrible; but take away from the contending armies the ability and right to organize what is now known as a Bureau of Military Justice, they would soon become monster savages, unrestrained by any and all ideas of law and justice. Surely no lover of mankind, no one that respects law and order, no one that has the instinct of justice, or that can be softened by mercy, would, in time of war, take away from the commanders the right to organize military tribunals of justice, and especially such tribunals for the protection of persons charged or suspected with being secret foes and participants in the hostilities.

161. Id.
162. Id.
The fact that the civil courts are open does not affect the right of the military tribunal to hold as a prisoner and to try. The civil courts have no more right to prevent the military, in time of war, from trying an offender against the laws of war than they have a right to interfere with and prevent a battle. A battle may be lawfully fought in the very view and presence of a court; so a spy, or bandit or other offender against the law of war, may be tried, and tried lawfully, when and where the civil courts are open and transacting the usual business.\footnote{Id.}

Thus, Speed concluded:

\[\text{[T]}\text{hat if the persons who are charged with the assassination of the President committed the deed as public enemies, as I believe they did, and whether they did or not is a question to be decided by the tribunal before which they are tried, they not only can, but ought to be tried before a military tribunal. If the persons charged have offended against the laws of war, it would be as palpably wrong of the military to hand them over to the civil courts, as it would be wrong in a civil court to convict a man of murder who had, in time of war, killed another in battle.}\text{\footnote{Id.}}\]

This was not a universally accepted opinion.\footnote{Compare Opinion of the Constitutional Power of the Military to Try and Execute the Assassins of the President, 11 Op. Att’y Gen. 297 (1865) with 2 GIDEON WELLES, DIARY OF GIDEON WELLES, SECRETARY OF THE NAVY UNDER LINCOLN AND JOHNSON 304 (1911).} Secretary of the Navy, Gideon Welles, was of the opinion that Secretary of War Edwin M. Stanton had pressured Speed into this position. Welles wrote in his diary on May 9, 1865: \[\text{“}\text{[T]}\text{he rash, impulsive, and arbitrary measures of Stanton are exceedingly repugnant to my notions, and I am pained to witness the acquiescence they receive.”\text{\footnote{See WELLES, supra note 166, at 304.}}}\]

Former Attorney General Bates shared the view that Stanton was behind Speed’s opinion. He wrote in his diary on May 25, 1865: \[\text{“}\text{I am pained to be led to believe that my successor, Atty Genl. Speed, has been wheedled out of an opinion, to the effect that such a trial is lawful. If he be, in the lowest degree, qualified for his office, he must know better . . .”}\text{\footnote{Howard K. Beale, The Diary of Edward Bates 1859-1866 483 (1933).}}\]

Bates then summed up the problem with a remarkable prophesy: \[\text{“}\text{[I]f the offenders be done to death by that tribunal, however truly guilty, they will pass for martyrs with half the world.”}\text{\footnote{Id.}}\]

Dr. Samuel Mudd was among those sentenced to prison for his involvement with the conspiracy to assassinate the President. Dr. Mudd was convicted by the
commission and sentenced to life in prison for providing shelter and medical assistance to conspirators John Wilkes Booth and David Herold on the night of the President’s assassination.\textsuperscript{170} Dr. Mudd also was convicted of having supplied the conspirators with horses the following day so that they could continue in their escape.\textsuperscript{171} During his trial, Dr. Mudd argued that the Hunter Commission lacked jurisdiction and that his trial before the Commission violated his constitutional right to a trial by jury in a civilian court with all its protections.\textsuperscript{172} The Commission itself, Attorney General James Speed, and Judge Thomas Jefferson Boynton of the United States District Court for the Southern District of Florida all rejected this argument.\textsuperscript{173}

President Andrew Johnson fully and unconditionally pardoned Dr. Mudd for his service in battling yellow fever that had spread in the prison.\textsuperscript{174} More than a century later, Mudd’s great-grandson, Dr. Richard D. Mudd, filed an application with the Army Board for Correction of Military Records (“ABCMR”), which sought a declaration that his great-grandfather was innocent and that the military commission lacked jurisdiction to try a Maryland citizen when there were fully functioning civil courts in Maryland that were competent to have tried Dr. Mudd.\textsuperscript{175} After a hearing, the ABCMR found that it was not authorized to consider the actual innocence or guilt of Dr. Mudd, but it unanimously concluded that the Commission did not have jurisdiction to try him and recommended that his conviction therefore be set aside.\textsuperscript{176} Nonetheless, the United States District Court for the District of Columbia dismissed the great-grandson’s appeal, finding that “if Dr. Samuel Mudd was charged with a law of war violation, it was permissible for him to be tried before a military commission even though he was a United States and Maryland citizen and the civilian courts were open at the time of the trial.”\textsuperscript{177}

VI. MILITARY COMMISSIONS DURING WORLD WAR II.

Almost a century later, President Franklin D. Roosevelt, like Lincoln, faced the momentous decision of to how to try those detailed at the height of World War II.\textsuperscript{178} In June 1942, several months after Congress had declared that a state of war existed between Germany and the United States, eight German saboteurs, acting for the German Reich, a belligerent enemy nation, boarded two submarines in occupied France and traveled to Long Island, New York, and

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Id.
\item Id.
\item Id.

\item Mudd, 134 F.Supp. 2d at 140.
\item Mudd, 134 F.Supp. 2d at 146.
\end{enumerate}
\end{footnotesize}
Ponte Vedra Beach, Florida, respectively. The German-born saboteurs were engaged in a plot to destroy war facilities in the United States. The President declared that:

> [A]ll persons who are subjects, citizens or residents of any nation at war with the United States or who give obedience to or act under the direction of any such nation, and who during time of war enter or attempt to enter the United States . . . through coastal or boundary defenses, and are charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war, shall be subject to the law of war and to the jurisdiction of military tribunals.

Roosevelt justified his proclamation by specifying that:

> [T]he safety of the United States demands that all enemies who have entered upon the territory of the United States as part of an invasion or predatory incursion, or who have entered in order to commit sabotage, espionage or other hostile or warlike acts, should be promptly tried in accordance with the law of war.

Roosevelt also made clear that he was issuing the order by virtue of the authority vested in him, as President of the United States and Commander in Chief of the Army and Navy, through the United States Constitution and the statutes of the United States.

That same day, Roosevelt issued a military order appointing seven generals to sit on the tribunal and two colonels to serve as defense counsel. He also directed the Attorney General and a judge advocate to conduct the prosecution. Roosevelt’s order gave the commission the power to “make such rules for the conduct of the proceeding, consistent with the powers of military commissions under Articles of War, as it shall deem necessary for a full and fair trial of the matters before it.” Roosevelt further directed that “evidence shall be admitted as would, in the opinion of the President of the Commission, have probative value to a reasonable man.” At least two-thirds of the members of the commission present were needed for a conviction or sentence. Finally, unlike the ordinary appeals process that would follow a conviction in the civilian

180. *Id.* at 20-21.
182. *Id.*
183. *Id.*
185. *Id.*
186. *Id.*
187. *Id.*
court system, the President’s order directed the commission to transmit its judgment to the President for his action thereon.\textsuperscript{188}

Upon their capture, the eight saboteurs were tried by a secret military tribunal, which resulted in a guilty verdict and a death sentence for each.\textsuperscript{189} The prisoners petitioned the United States District Court for the District of Columbia for a writ of habeas corpus, which was denied.\textsuperscript{190} The prisoners then petitioned the United States Supreme Court for certiorari to review the district court’s decision and additionally petitioned the Supreme Court for leave to file their petitions for habeas corpus in that Court as well.\textsuperscript{191} The Supreme Court had not yet issued a decision when the prisoners also petitioned the United States Court of Appeals for the District of Columbia Circuit.\textsuperscript{192} Before a decision was issued by the Court of Appeals, the prisoners again petitioned the Supreme Court for certiorari, which the Court granted.\textsuperscript{193}

The Supreme Court considered whether the detention of the petitioners by the United States was consistent with the laws and Constitution of the United States.\textsuperscript{194} The Court explained that “military tribunals ... are not courts in the sense of the Judiciary Article [of the Constitution].”\textsuperscript{195} Instead, the Court noted that such Article I tribunals are administrative bodies within the military that are utilized to determine the guilt or innocence of declared enemies and to subsequently pass judgment.\textsuperscript{196}

Upholding the jurisdiction of the military tribunals to hear the cases of the German saboteurs, the Court emphatically stated:

\begin{quote}
The law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.\textsuperscript{197}
\end{quote}

In so ruling, the Court went to great lengths to distinguish its holding from that rendered years before in \textit{Milligan}.\textsuperscript{198} The Supreme Court emphasized that the holding in \textit{Milligan} should be limited to the facts of that case.\textsuperscript{199} As the \textit{Quirin

\begin{footnotes}
188. \textit{Id.}
189. \textit{Quirin}, 317 U.S. at 22; \textit{FISHER}, supra note 178, at 43-44.
191. \textit{Id.}
192. \textit{Id.} at 19-20.
193. \textit{Id.}
194. \textit{Id.} at 24-25.
198. \textit{Id.} at 29.
199. \textit{Id.} at 45.
\end{footnotes}
Court noted, Milligan was a citizen of Indiana and had never been a resident of any state involved in the rebellion nor had he been an enemy combatant who would qualify as a prisoner of war.\textsuperscript{200} Quirin, however, involved “enemies who, with the purpose of destroying war materials and utilities, entered, or after entry remained in, our territory without uniform - an offense against the law of war.”\textsuperscript{201} Those critical distinctions allowed the Court to rule in the government’s favor.\textsuperscript{202}

Having resolved in Quirin the appropriateness of trying unlawful enemy combatants by military tribunal within the United States, the Court next considered the related question of whether alien prisoners seized overseas during wartime had the right to petition the courts of the United States for a writ of habeas corpus.\textsuperscript{203}

The case of \textit{Johnson v. Eisentrager}\textsuperscript{204} involved one Ludwig Eisentrager, who had operated a German intelligence office in Shanghai and, with his cohorts, had contracted to aid the Japanese during World War II in return for money and food.\textsuperscript{205} Specifically the spies agreed, inter alia, to intercept American naval communications and transmit them to the Japanese forces.\textsuperscript{206}

In 1946, the United States military captured Eisentrager and twenty-six other foreign intelligence officers in China.\textsuperscript{207} The officers were tried and convicted by a United States military commission.\textsuperscript{208} They were then imprisoned in a German prison then controlled by the United States Army.\textsuperscript{209}

Seeking to challenge their detention, Eisentrager and twenty other German nationals petitioned the United States District Court for the District of Columbia for a writ of habeas corpus.\textsuperscript{210} The district court dismissed the petition for lack of jurisdiction, but the Court of Appeals subsequently reversed, reinstating the petition for habeas corpus and remanding the case for further proceedings.\textsuperscript{211}

When the case finally reached the United States Supreme Court on the government’s petition for certiorari, the high court agreed with the district court and held that the petitioners had no right to petition for a writ of habeas corpus.\textsuperscript{212} Finding the location of the prisoners’ capture, conviction, and detention dispositive, the Supreme Court stated that “these prisoners at no

\begin{footnotes}
relevant time were within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States."213

VII. MILITARY COMMISSIONS DURING THE WAR ON TERROR

In 2001, issues of the habeas corpus rights of enemy combatants, markedly similar to those that arose during the Lincoln and Roosevelt administrations appeared once again on the Supreme Court’s docket. The events of September 11, 2001, were inhumane and unanticipated by most Americans and individuals throughout the world. On that autumn morning, nineteen Islamic terrorists hijacked four commercial jet airliners, intentionally flying two of the planes into the twin towers of New York City’s World Trade Center and one into the Pentagon in Arlington, Virginia.214 The fourth plane, believed to have been aimed at the White House in Washington, D.C., crashed in Shanksville, Pennsylvania, when its passengers attempted to retake control of the plane to avert further mass murder.215 In one morning, almost 3,000 innocent civilians perished on American soil as victims of horrific depredations committed by nihilistic barbarians.216

President Bush, aware of his solemn duty to take action to defend and protect the United States, responded.217 As a nation, we responded with a War on Terror in the hope that it would serve to secure our borders.218

The President’s critics wasted no time in declaring that September 11th did not constitute the commencement of a war.219 They argued that President Bush

213. Id. at 778.
215. Id. at 14.
217. George W. Bush, Radio Address (Sept. 15, 2001), available at http://georgewbush-whitehouse.archives.gov/news/release/2001/09/20010915.html ("We are planning a broad and sustained campaign to secure our country and eradicate the evil of terrorism."); see also George W. Bush, Radio Address (Dec. 17, 2005), available at http://georgewbush-whitehouse.archives.gov/news/releases/2005/12/20051217.html ("The American people expect me to do everything in my power under our laws and Constitution to protect them and their civil liberties. And that is exactly what I will continue to do, so long as I'm the President of the United States.").
generalized the War on Terror, likening it to the so-called war on drugs, war on poverty, gang wars, or war of the sexes. Nevertheless, the President, the Congress, and the terrorists made it abundantly clear that we were a nation at war.

Three days after the attacks that compromised our nation’s security, President Bush declared a national emergency, to which Congress responded by enacting an Authorization for Use of Military Force (AUMF) on September 18, 2001. The AUMF empowered the President to take action and prevent acts of international terrorism against the United States. It further authorized the President to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks.” Congress’s authorization was, in all respects, a ratification of the President’s actions as Commander-in-Chief and checkmated any potential criticism he might have otherwise been subjected to for acting unilaterally. Further confirming the existence of a state of war, approximately two months later the President issued an order permitting the establishment of military commissions to detain and prosecute suspected terrorists. The effect of that order was to convene the first United States military commission in over fifty years. President Bush emphasized that trial by military commission was necessary to protect the United States and its citizens “in light of grave acts of terrorism and threats of terrorism.” His order made it clear that it was not practical for such tribunals to apply without modifying the principles of law and the rules of evidence generally recognized in federal criminal trials.

220. See, e.g., Todd Richissin, "War on terror" difficult to define, BALTIMORE SUN, Sept. 2, 2004, available at http://community.seattletimes.nwsource.com/archive/?date=20040902&slug=russanal02 (The War on Terror has been deemed analogous to the War on Drugs because the “enemy” is unascertainable and terrorism, like drugs, will not likely end as a result of a war.).
221. JOHN YOO, WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR 11 (2006).
224. Id.
225. Id.
226. CUTLER, supra note 205, at 23.
227. Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001). Military tribunals are constitutionally and statutorily authorized special courts composed of military personnel and/or civilians who are commissioned to sit as both trier of fact and of the law. In such proceedings, any evidence deemed to have probative value will be admitted.
The President’s order establishing military commissions was suspect in the eyes of some legal commentators. 230 The American Bar Association (ABA) convened a task force on terrorism and the law, which eventually issued a report and recommendation on military commissions. 231 Although the ABA conceded that the President’s order did not expressly suspend the writ of habeas corpus, the ABA, fearing that the order might be interpreted as having done so, took the position that even if the President desired to suspend the writ “it is most unlikely that [he] could.” 232 In its recommendation, the ABA urged the government to afford habeas corpus relief in the federal courts for those tried by military commission in the United States. 233

A. The Supreme Court Trilogy: Padilla, Rasul, and Hamdi

Against this backdrop, detainees held captive by the United States in Guantanamo Bay, Cuba, petitioned the federal courts for habeas corpus relief. June 2004 marked a turning point for those detained in Guantanamo as the United States Supreme Court, in a trilogy of cases, spelled out what was required of the United States government in its efforts to properly achieve the necessary constitutional balance between civil liberties and national security.

1. Rumsfeld v. Padilla 234

On May 8, 2002, acting pursuant to a previously issued arrest warrant, federal law enforcement agents arrested Jose Padilla, a United States citizen, at O’Hare International Airport in Chicago. 235 Padilla was considered to be a material witness with respect to the September 11, 2001 attacks, and he was also believed to have been engaged in plotting to plant a radiological dispersal device in the United States. 236 Within one month of his arrest, Padilla was designated an enemy combatant who posed a grave threat to national security. 237 Accordingly, he was placed in the custody of the Department of Defense, and he was held in a United States Navy brig in Charleston, South Carolina. 238
immediately petitioned the United States District Court for the Southern District of New York for habeas corpus relief pursuant to 28 U.S.C. § 2241.239

In denying Padilla’s petition, the district court held that the President of the United States was authorized to designate and detain an American citizen captured on American soil as an “enemy combatant.”240 Therefore, Padilla could only challenge a subsequent conviction by way of appeal.241

Dissatisfied, Padilla appealed to the United States Court of Appeals for the Second Circuit, which reversed the district court’s ruling.242 The Second Circuit ruled that the executive branch could not detain American citizens in military detention facilities without congressional authorization.243 Ultimately, the court remanded the case to the district court with instructions to grant the writ of habeas corpus and directed the Secretary of Defense to release Padilla within thirty days unless either criminal charges were brought against him or he was deemed a material witness in connection with grand jury proceedings.244 The case reached the United States Supreme Court on the government’s appeal.245

In a 5-4 decision, the Court ruled on jurisdictional grounds and held that Padilla’s habeas corpus petition had been improperly filed.246 Because Padilla was held at the Navy brig in Charleston, South Carolina, the habeas petition was faulty because it should have been filed in the United States District Court for the District of South Carolina.247 Moreover, the petition should have named the Navy facility’s commander as the defendant, not the Secretary of Defense.248 Accordingly, the Court reversed the Second Circuit’s decision and remanded the case so that it could be dismissed without prejudice.249

Padilla promptly filed a new petition for a writ of habeas corpus, this time appropriately invoking the jurisdiction of the United States District Court for the District of South Carolina.250 Agreeing with the petitioner, the district court ruled that the President lacked the authority to detain Padilla and his detention was therefore in violation of the Constitution.251 The district court ordered that the government either bring federal criminal charges against Padilla or release

239. Id.
241. See Padilla v. Rumsfeld, 352 F.3d 695 (2d Cir. 2003).
242. Id. at 724.
243. Id.
244. Id.
245. Rumsfeld, 542 U.S. at 434.
246. Id. at 451.
247. Id.
248. Id. at 442. The Court so ruled because the facility commander was Padilla's immediate custodian. Secretary Rumsfeld, therefore, was improperly named as a defendant in the original filing.
249. Id. at 451.
251. Id.
him. However, when the case reached the United States Court of Appeals for the Fourth Circuit on the government’s appeal, that court reversed the district court and held that the AUMF authorized Padilla’s detention without prosecution for the duration of hostilities. Padilla then petitioned the Supreme Court for a writ of certiorari. While this petition was pending, however, the government indicted Padilla and in late 2005 the Bush administration filed a motion in the Fourth Circuit seeking the court’s approval of Padilla’s transfer from military custody in Charleston to a federal detention center in Miami, Florida. Concerned that, if the appellate court were to approve the transfer, the Supreme Court’s consideration of Padilla’s pending petition for certiorari would be affected, the Fourth Circuit deferred consideration of the issue and denied the request. The court concluded that the Supreme Court ought to decide the case. Dissatisfied with the Fourth Circuit’s ruling, the Bush administration petitioned the Supreme Court for the same authorization.

On January 4, 2006, the Supreme Court ordered Padilla’s transfer from Charleston to Miami, this time to face criminal conspiracy charges in civilian court. After slightly more than a day of deliberations, on August 16, 2007, a federal jury found Padilla guilty of terrorism conspiracy charges. Although Padilla was ultimately sentenced to seventeen years in prison, a three-judge panel of the United States Court of Appeals for the Eleventh Circuit ruled that

252. Id.
253. Id. at 391, 397.
256. Hanft v. Padilla, 432 F.3d 582, 583 (4th Cir. 2005). The government's motion was made pursuant to Supreme Court Rule 36, which authorizes the transfer of a prisoner in a habeas corpus proceeding only upon the authorization of the court or judge who entered the decision under review.
257. Id. at 583-84.
259. Id.; see also Terry Aguayo, Padilla Pleads Not Guilty; Bail is Denied, N.Y. TIMES, Jan. 13, 2006, at A14.
260. Abby Goodnough & Scott Shane, Padilla is Guilty on All Charges in Terror Trial, N.Y. TIMES, Aug. 17, 2007, at A1. Some commentators suspect that critics of the Military Commission system will point to the Padilla verdict in support of their position that the civilian criminal justice system is suitable to try detainees during the War on Terror. However, as the editorial staff of the Wall Street Journal was quick to note, the Padilla verdict is "not a model for the future handling of enemy combatants." Editorial, The Padilla Verdict, WALL. ST. J., Aug. 17, 2007, at A12. As discussed further infra, it would be unrealistic to try alien enemy combatants in the civilian criminal justice system. See infra Part VI.A. While it is easy to require law enforcement agents to afford protections required of our criminal justice system such as Miranda warnings when arresting citizens in a local airport, for example it would be wholly unrealistic to expect that such protections could be afforded to alien enemy combatants arrested in a desert in the Middle East. See The Padilla Verdict, supra. Failing to afford such protections would result in defendants tried in the civilian criminal justice system being set free. See also id.
the sentence was too lenient and sent the case back for a new sentencing hearing.\footnote{United States v. Joyyousi, No. 08-10494, 2011 U.S. App. LEXIS 19215 (11th Cir. Sept. 19, 2011).}

2. Rasul v. Bush

In a decision rendered the same day as the Padilla decision, the Supreme Court was called upon to answer a single question: “whether the habeas corpus statute\footnote{28 U.S.C. §§ 2241(a), (c)(3) (2000).} confers a right to judicial review of the legality of Executive detention of aliens [at Guantanamo].”\footnote{Rasul v. Bush, 542 U.S. 466, 475 (2004).} In contrast to the Padilla case, the Supreme Court reached the merits of the case and answered the question in the affirmative.\footnote{Id. at 484.}

Under American law, detained individuals seeking habeas corpus relief must first invoke the court’s jurisdiction by establishing either they are citizens of the United States or the Court has jurisdiction over such a petition.\footnote{Id. at 475.} Because the detainees in Rasul v. Bush were not, in fact, citizens, the issue was narrowed to whether there was federal court jurisdiction over the Guantanamo Bay facility.\footnote{Rasul, 542 U.S. at 475.}

Relying on Johnson v. Eisentrager,\footnote{Johnson, 339 U.S. at 763.} the United States District Court for the District of Columbia ruled that no court in the United States has jurisdiction to hear habeas petitions filed by aliens detained outside the United States.\footnote{Rasul v. Bush, 215 F. Supp. 2d 55, 66 (D.D.C. 2002).} On appeal to the United States Court of Appeals for the District of Columbia Circuit, the district court’s ruling was affirmed, with the appellate court also relying on Eisentrager.\footnote{Al Odah v. United States, 321 F.3d 1134, 1145 (D.C. Cir. 2003).}

When the case reached the United States Supreme Court, the government again urged that Eisentrager controlled.\footnote{Rasul, 542 U.S. at 475.} As further support for its position, the government cited the treaty between the United States and Cuba regarding Guantanamo Bay.\footnote{Brief for the Respondents in Opposition at 3-4, Rasul v. Bush, 542 U.S. 466 (2004) (No. 03-334).} Pointing to that portion of the treaty specifying that the United States maintains “complete jurisdiction” while Cuba has “ultimate sovereignty,”\footnote{See Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval stations, Feb. 23, 1903, available at http://avalon.law.yale.edu/20th_century/dip_cuba002.asp.} the government argued that habeas corpus would not be available because no federal court would have jurisdiction over such a
petition.\textsuperscript{273} For their part, however, the detainees pointed to the government’s concession that, if the prisoners were being held in the United States, the federal courts would be open to them.\textsuperscript{274} According to the detainees, there was “no persuasive reason why an area subject to the complete, exclusive, and indefinite jurisdiction and control of the United States, where this country alone has wielded power for more than a century, should be treated the same as occupied enemy territory, temporarily controlled as an incident of wartime operations.”\textsuperscript{275}

In the Court’s 6-3 decision, the majority quickly rejected the government’s contentions, noting the difference between those detained in Guantanamo and the \textit{Eisentrager} detainees.\textsuperscript{276} The Court explained:

\begin{quote}
[The detainees in \textit{Rasul} are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with or convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.\textsuperscript{277}]
\end{quote}

Writing for the majority, Justice Stevens opined that a detainee need not be within the territorial jurisdiction of a district court for the court to have jurisdiction pursuant to the habeas statute. Citing \textit{Milligan} and \textit{Quirin}, the Court noted that federal courts have, in fact, reviewed applications for habeas relief during wartime.\textsuperscript{278} The Court recalled that in \textit{Milligan} it entertained the habeas petition of an American who plotted to attack military installations during the Civil War, and in \textit{Quirin}, the petition of self-proclaimed enemy combatants who were convicted of war crimes and detained in the United States during World War II.\textsuperscript{279}

Holding that the district court did, in fact, have jurisdiction over such challenges made by detainees with respect to their indefinite detention in a facility under the control of the United States,\textsuperscript{280} the Supreme Court remanded the matter to the district court.\textsuperscript{281}

In a vehement dissent, in which Chief Justice Rehnquist and Justice Thomas joined, Justice Antonin Scalia described the majority’s opinion as “a wrenching

\begin{itemize}
\item \textsuperscript{275} \textit{Id.} at 41-42.
\item \textsuperscript{276} \textit{Rasul}, 542 U.S. at 476 (Justice Kennedy concurred in the judgment but not in Justice Stevens’ opinion).
\item \textsuperscript{277} \textit{Id.}
\item \textsuperscript{278} \textit{Id.} at 474-75.
\item \textsuperscript{279} \textit{Id.}
\item \textsuperscript{280} \textit{Id.} at 483.
\item \textsuperscript{281} \textit{Id.} at 485.
\end{itemize}
departure from precedent."\(^{282}\) According to Justice Scalia, the majority impliedly overruled \textit{Eisentrager} and ignored the plain language of the habeas statute, which requires that at least one federal district court have territorial jurisdiction over detainees.\(^{283}\) Because Guantanamo detainees are not located within the territorial jurisdiction of any federal district court, Justice Scalia concluded that jurisdiction pursuant to the habeas statute was improper.\(^{284}\)

3. Hamdi v. Rumsfeld

A third case heard by the Supreme Court in April of 2004 involved Yaser Esam Hamdi, an American citizen captured on the battlefield in Afghanistan in 2001.\(^{285}\) Because Hamdi was captured overseas in a combat zone, the case presented a far different issue from that in \textit{Padilla},\(^{286}\) and his status as a United States citizen distinguished the issues in his case from those before the Court in \textit{Rasul}.\(^{287}\)

Although Hamdi was born in Louisiana, he moved with his family when he was a young child to Saudi Arabia.\(^{288}\) He eventually affiliated with the Taliban and was captured when his unit surrendered to Northern Alliance forces during a battle in Afghanistan.\(^{289}\)

After Hamdi’s capture, he was detained in Afghanistan and later transferred to the United States Naval Base at Guantanamo Bay, where he remained for four months.\(^{290}\) Upon learning that Hamdi was an American citizen, the government transferred him to a Navy brig in Norfolk, Virginia and then to a similar brig in Charleston, South Carolina.\(^{291}\) The government designated him an “illegal enemy combatant” on the basis of its belief that he had been aiding the Taliban in combat against American forces in Afghanistan.\(^{292}\) Hamdi’s detention prompted his father to petition the United States District Court for the Eastern District of Virginia for a writ of habeas corpus.\(^{293}\)

Before the district court, Hamdi argued that, as an American citizen, he was entitled to the full panoply of constitutional protections, including the right to

\(^{282}\) \textit{Rasul}, 542 U.S. at 505 (Scalia, J., dissenting).

\(^{283}\) \textit{Id}. at 488-506.

\(^{284}\) \textit{Id}. at 505.


\(^{286}\) See Hamdi v. Rumsfeld, 337 F.3d 335, 344 (4th Cir. 2003) (Wilkinson, J., concurring) ("To compare this battlefield capture to the domestic arrest in Padilla v. Bush is to compare apples and oranges.").

\(^{287}\) Hamdi, 542 U.S. at 577 (Scalia, J., dissenting).

\(^{288}\) \textit{Id}. at 510.

\(^{289}\) \textit{Id}. at 510.

\(^{290}\) \textit{Id}. at 510-11.

\(^{291}\) \textit{Id}. at 511.
petition for a writ of habeas corpus. The United States government, not convinced, moved to dismiss Hamdi’s petition. In support of its motion, the government attached the affidavit of Michael Mobbs, Special Advisor to the Under Secretary of Defense for Policy. Mobbs attested to the fact that Hamdi had been captured in Afghanistan during armed hostilities and that a series of American military screening procedures had determined that he met the criteria for an unlawful enemy combatant.

However informative the Mobbs affidavit might have been, the district court believed that it fell short of containing enough information to justify Hamdi’s detention. Not surprisingly, the government sought interlocutory review of the district court’s ruling in the United States Court of Appeals for the Fourth Circuit. When the case reached that court, the panel expressly indicated that deference, in the conduct of war, should be afforded to the President. It stated: “The judiciary is not at liberty to eviscerate detention interests directly derived from the war powers of Articles I and II.” The court upheld the President’s authority to detain a United States citizen captured on the battlefield and to designate such an individual an unlawful enemy combatant.

The case reached the United States Supreme Court and, in stark contrast to the Fourth Circuit’s opinion, eight of the nine justices rejected the government’s position that great deference should be afforded to presidential decisions regarding national security. Writing for a plurality, Justice Sandra Day O’Connor explained that “[w]e 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.”

The plurality decision in Hamdi is illustrative of the concept of separation of powers that is so deeply rooted in the American system of government. Most notable is the judiciary’s ability to review executive branch actions that allegedly infringe upon a citizen’s constitutional rights. According to the Court, such judicial review is available, even in times of national emergency. The Court’s

296. Id.
297. Id. at 461-62.
298. Id. at 462.
299. Id.
300. Hamdi, 316 F.3d at 471-72.
301. Id. at 466.
302. Id. at 474-75.
304. Justice Clarence Thomas was the only justice to side entirely with the government.
decision in *Hamdi* maintained individual civil liberties while simultaneously divesting the White House of its power to limit the rights of United States citizens who had been designated unlawful enemy combatants during a national emergency.\(^{308}\)

The plurality of the Court in *Hamdi* was also greatly concerned that detaining individuals indefinitely would deprive such persons of their due process rights.\(^{309}\) Although cognizant of the consideration that national security interests militate in favor of more lenient procedural rules, the Court nonetheless opined that the government had failed to achieve the appropriate constitutional balance.\(^{310}\) The Court reasoned that “the risk of an erroneous deprivation of a detainee’s liberty is unacceptably high under the Government’s proposed rule.”\(^{311}\) Justice O’Connor’s opinion mandated that citizen-detainees receive notice of the government’s factual basis for their classification as enemy combatants and a fair opportunity to rebut that assertion before a neutral decision maker.\(^{312}\) Expressing the *Hamdi* plurality’s due process concerns, Justice O’Connor wrote: “An interrogation by one’s captor, however effective an intelligence-gathering tool, hardly constitutes a constitutionally adequate fact-finding before a neutral decision-maker.”\(^{313}\) Furthermore, the plurality indicated that Hamdi “unquestionably has the right of access to counsel in connection with the proceedings on remand.”\(^{314}\)

According to the plurality, “it is during our most challenging and uncertain moments that our Nation’s commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.”\(^{315}\) The plurality perceived irony in the denial by the United States of personal liberties at home while simultaneously fighting for such liberties abroad.\(^{316}\) The plurality’s decision officially repudiated the United States government’s suspension of certain individual liberties\(^{317}\) because, in Hamdi’s case, due process should have afforded him a meaningful opportunity to contest his detention before a neutral decision maker.

Justices Scalia and Stevens dissented, maintaining that Hamdi was entitled to habeas corpus relief unless criminal proceedings were promptly brought, or Congress had suspended the writ of habeas corpus.\(^{318}\) Although conceding that Hamdi’s case was not an easy one in light of the competing demands of national

\(^{308}\) *Id.*

\(^{309}\) *See Hamdi*, 542 U.S. 507.

\(^{310}\) *Id.* at 532.

\(^{311}\) *Id.*

\(^{312}\) *Id.* at 533.

\(^{313}\) *Id.* at 537.

\(^{314}\) *Id.* at 539.

\(^{315}\) *Hamdi*, 542 U.S. at 532.

\(^{316}\) *Id.*

\(^{317}\) *Id.* at 533.

\(^{318}\) *Id.* at 573.
security and the rights of citizens to personal liberties, the two justices tilted towards the side of personal liberty.319

Nonetheless, the government had reason to be pleased with other aspects of the *Hamdi* decision. Five members of the court agreed that citizens of the United States could be held as enemy combatants,320 and four of them also believed that the President had the authority to designate specific persons as enemy combatants.321 However, whatever hope remained for the Bush administration’s policies in the wake of *Hamdi*, it was eviscerated by a decision of the Supreme Court two years later.322

B. *Hamdan v. Rumsfeld*

As one journalist described as “the most significant setback yet for the administration’s broad expansions of presidential power,”323 the United States Supreme Court in *Hamdan v. Rumsfeld*324 ruled that President Bush’s first attempt at establishing military commissions violated both the Uniform Code of Military Justice (UCMJ) and the Geneva Convention of 1949.325 As such, the Court struck down the military commissions, leaving Congress and the President to reconsider their approach to this gathering storm.326

Salim Ahmed Hamdan, a Yemeni national originally charged with conspiracy to commit “offenses triable by military commission,” petitioned the United States District Court for the District of Columbia for a writ of habeas corpus in response to his impending military commission trial.327 The district court granted Hamdan’s petition.328 In November 2004, the court barred the military commission from trying Hamdan.329 The court reasoned that the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949

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319. *Id.* at 554.
320. The members of the court who were of that opinion were Chief Justice Rehnquist and Justices O’Connor, Kennedy, Thomas, and Breyer.
321. The members of the court who were of that opinion were Chief Justice Rehnquist and Justices O’Connor, Kennedy, and Breyer.
325. *Id.* at 567.
326. *See id.*
328. *Id.* at 173.
329. *Id.*
mandates that those tried by military commission must first be designated a prisoner of war, and a “competent tribunal” had not yet determined whether Hamdan fit this criterion. The district court also ruled that the military commission that sought to try Hamdan was formed in violation of the Uniform Code of Military Justice (UCMJ). Setting out the precise requirements, the district court explained that before a prisoner may be tried by a military tribunal there must first be a hearing in order to determine whether the terms of the Geneva Convention apply. If the Geneva Convention does apply, the defendant is entitled to have his case heard under the UCMJ. Thus, the defendant would receive the same procedural safeguards as any member of the American armed forces. The Bush administration appealed.

In July 2005, the United States Court of Appeals for the D.C. Circuit granted a victory, although temporary, for the government and overturned the district court’s decision. The Circuit Court stated unequivocally that the Geneva Convention did not apply to members of the al Qaeda terrorist network.

Responding to the Circuit Court’s decision, the military commission prepared to try Hamdan, but its efforts were again thwarted when the United States Supreme Court granted review of Hamdan’s case. In a blow to the Bush administration, the Court rendered a 5-3 decision, holding that the military commissions, as then structured, violated the UCMJ and the Geneva Convention. In the end, the Court did not take issue with the existence of the military tribunals per se, but rather focused its concern on the procedural means employed to convene them.

Four members of the Court explicitly advised the President to reconsider his strategy and to seek authorization from Congress. “Nothing prevents the President from returning to Congress to seek the authority he believes necessary,” Justice Breyer noted in his concurring opinion, which was joined by

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332. Id. at 165-66.
333. Id. at 161-62.
334. Id. at 160.
336. Id. at 34.
337. Id. at 40. The present Chief Justice, John Roberts, at that time a judge on the Court of Appeals for the District of Columbia Circuit, was one of those who ruled in favor of the government's position.
339. Chief Justice Roberts' earlier involvement in the case resulted in his recusal at the Supreme Court level.
Justices Kennedy, Souter, and Ginsburg. Beyond their suggestion to the President, these four justices also made clear that Congress had authority to revisit the issue and to ultimately grant the President the power to convene such tribunals. Lastly, Justice Kennedy noted that Hamdan’s military commission exceeded the bounds Congress had placed on the President’s authority and because Congress prescribed the limits, Congress could change them.

C. Military Commissions Act of 2006

Following the Supreme Court’s advice in *Hamdan*, President Bush returned to Congress to seek the necessary authorization. This time, with Congress’s authorization, President Bush signed into law the Military Commissions Act of 2006 (MCA of 2006). The act’s stated purpose was to bring “to justice terrorists and other unlawful enemy combatants through full and fair trials by military commissions . . . .” Moments before signing the MCA of 2006 into law, President Bush explained that his original attempt at establishing a system of military commissions for the trial of alien detainees failed when the Supreme Court held that military commissions needed to be expressly authorized by Congress.

The primary effect of this new legislation was to establish the jurisdiction of military tribunals. Specifically, by way of a section titled “Habeas Corpus Matters,” the act abrogated federal court jurisdiction with respect to petitions for writs of habeas corpus filed by or on behalf of alien unlawful enemy combatants detained anywhere by the United States. The section, in relevant part, provided:

No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

Maintaining our nation’s commitment to the Geneva Convention, the MCA of 2006 accentuated the importance of a just system to prosecute suspected
Accordingly, the act conferred jurisdiction on military commissions that “extends solely to aliens who have engaged in hostilities against the United States or who have purposefully and materially supported hostilities against us.”

Importantly, the act afforded alien enemy combatants a full panoply of protections. Specifically, the act first authorized a Combatant Status Review Tribunal or another competent tribunal established under the authority of either the President of the United States as Commander-in-Chief or the Secretary of Defense, to designate unlawful enemy combatants. Charges against those individuals fell within the jurisdiction of military commissions, special trial-level courts established to hear those cases involving offenses punishable under the act or the laws of war. This second stage consisted of procedures that were more protective of detainees’ rights than any other military commission in American history. Additionally, the MCA of 2006 authorized the Secretary of Defense to prescribe rules of evidence and procedure for use by military commissions.

Equally as important, the act provided for a Court of Military Commission Review, a special appellate-level court, with a three-member panel to review the decision of the commission. As a third-level check, the act confirmed the Detainee Treatment Act’s authorization of an appeal to the United States Court of Appeals for the D.C. Circuit. The act otherwise eliminated federal court jurisdiction over alien detainee petitions for habeas corpus. Finally, in addition to the foregoing, the act conferred a fourth level of review, authorizing the United States Supreme Court’s review, by certiorari, of the federal circuit court’s decision.

Admittedly, the MCA of 2006 precluded alien detainees from seeking immediate review of their detention, but it did so by exchanging that opportunity for protections that include four separate levels of judicial review.

352. See United States Military Commissions Act of 2006, supra note 346, at § 948(d).
354. Id. at § 948(b).
357. See United States Military Commissions Act of 2006, supra note 346, at § 948(f).
358. See id. at § 950(g).
359. See id.
360. See id. at § 950(g)(d).
D. Boumediene v. Bush

On February 20, 2007, a three-member panel of the United States Court of Appeals for the District of Columbia Circuit ruled that the Military Commissions Act forecloses the opportunity for aliens detained at Guantanamo to seek habeas corpus relief. The decision was the first to uphold the constitutionality of a central tenet of the MCA since its passage in October 2006. Not only was this a significant victory for the Bush administration, but the decision also was thought to have heralded a new era for national security.

The issue before the Boumediene court was whether federal courts have jurisdiction over petitions for writs of habeas corpus filed by aliens captured abroad and detained as unlawful enemy combatants at Guantanamo. The detainees argued that the Supreme Court’s decision in Rasul settled the question and conferred on alien detainees a right to seek a writ of habeas corpus. The government, however, urged the court to recognize that Rasul was decided strictly on the basis of the habeas corpus statute then in place. According to the government, the Constitution does not afford alien detainees a right to petition for a writ of habeas corpus, nor would such a right have been available at common law. Therefore, Congress could decide whether to afford such a right to those presently detained at Guantanamo. By enacting the MCA of 2006, Congress made clear that it would not afford such a right to detainees. Ultimately, the government hoped that the court would conclude that federal courts do not have jurisdiction over such petitions, thereby validating the provision of the Military Commissions Act which denied federal courts jurisdiction to review the detention of foreign nationals.

The majority opinion, authored by Judge Randolph, immediately recognized that recent changes in the law sharply distinguished the Rasul decision from the issue before the court. The majority explained that Rasul was decided pursuant to the habeas corpus statute then in effect, which was first altered by the passage of the Detainee Treatment Act and then again by the passage of the MCA of 2006.

362. Id. at 984.
366. Judge David B. Sentelle concurred in Judge Randolph's majority opinion.
367. Boumediene, 476 F.3d at 984-86.
368. The MCA reads:

(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have
Judge Randolph began with the Supreme Court’s proposition in *INS v. St. Cyr*, 369 that the Suspension Clause should be interpreted, at minimum, to protect the writ of habeas corpus as it existed in 1789 when the first Judiciary Act established the federal court system and conferred upon the courts jurisdiction to issue writs of habeas corpus. 370 Accordingly, his opinion navigated the history of the Great Writ, tracing it back to its origins in medieval England and found it compelling that, at that time, the writ of habeas corpus extended only to the King’s dominions. 371 Furthermore, the court’s examination of history revealed that the privilege of habeas corpus would not have been available to aliens at the time the first Judiciary Act was passed unless the detainee was physically present in the United States or owned property therein. 372

Examining more recent United States case law, the majority was particularly convinced that the Supreme Court’s decision in *Johnson v. Eisentrager* 373 “ended any doubt about the scope of common law habeas.” 374 In *Eisentrager*, the Supreme Court stated:

> We are cited to no instance where a court, in this or any country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction. Nothing in the text of the Constitution extends such a right, nor does anything in our statutes. 375

Judge Judith W. Rogers argued in dissent that it was unconstitutional to deprive alien detainees the right to seek habeas corpus. 376 According to Judge Rogers, aliens have a right to petition for a writ of habeas corpus and that right may only be suspended by Congress upon a finding that the public safety requires it in cases of rebellion or invasion. 377 She reasoned that, because Congress failed to make the requisite findings to properly invoke the suspension

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370. *Boumediene*, 476 F.3d at 988.
371. *Id.* at 989-90.
372. *Id.* at 990.
374. *Boumediene*, 476 F.3d at 990.
375. *Id.* (quoting *Eisentrager*, 339 U.S. at 768).
376. *Id.* at 995 (Rogers, J., dissenting).
of habeas, removal of federal court jurisdiction over such petitions was unconstitutional.378

Once the Boumediene decision was issued, it was expected that the hundreds of habeas cases already filed in the federal courts would not be heard, leaving alien unlawful enemy combatants to challenge their detention in federal courts only after the culmination of military proceedings and appeals. At the time there were approximately 400 habeas petitions pending that had been filed on behalf of unlawful enemy combatants detained at Guantanamo.379

In a final effort to strike down the Military Commissions Act of 2006, the alien detainees petitioned the Supreme Court for a writ of certiorari.380 The Supreme Court initially denied the detainee’s petition and, in an unusual move,381 published a statement of two justices respecting the denial, along with the opinion of three dissenting justices who would have granted the petition.382 In their opinions, Justices Stevens and Kennedy wrote, despite the obvious importance of the matter, it was not ripe for the Court’s review until the detainees had exhausted all other avenues of appeal provided for by the MCA of 2006.383 However, Justices Breyer, Souter, and Ginsburg disagreed, contending that immediate review by the Court was warranted to diminish the legal uncertainty surrounding the application of this fundamental constitutional principle to Guantanamo detainees.384

It was thought that the Supreme Court’s denial of certiorari would allow the high court to defer consideration of the question until after the alien detainees exhausted the appeal procedures provided in the MCA of 2006.385 In a surprising turn of events, the Supreme Court changed course and granted the petition which it denied only three months earlier.386 Despite the unusual nature of the Supreme Court’s abrupt change of position, it offered no explanation. In

378. INS, 533 U.S. at 995.
381. See Robert L. Stern et al., Supreme Court Practice 301 (8th ed. 2002). "Most orders of the Court denying petitions for writs of certiorari do no more than announce the simple fact of denial, without giving any reasons therefore." Id.
382. Boumediene, 549 U.S. 1328.
383. Id. at 1329.
384. Id. at 1330 (quoting Brief for United States Senator Arlen Specter as Amicus Curiae Supporting Petitioners, at 19, Boumediene v. Bush, 127 S. Ct. 1478 (2007) (Nos. 06-1195, 06-1196)).
the view of some commentators, it was the result of Justice Anthony M. Kennedy’s change of heart despite his initial opposition to granting certiorari.\textsuperscript{387}

Others suspect that the Court’s reversal of its previous order was in response to an affidavit submitted by a military insider.\textsuperscript{388} In support of their petition for a rehearing on whether the court would grant certiorari, lawyers for the detainees filed the seven-page affidavit of Lieutenant Colonel Stephen E. Abraham, who had been assigned to the Pentagon unit overseeing the hearings at Guantanamo.\textsuperscript{389} In his affidavit, Abraham described the hearings as flawed and likened the review process to a rubber-stamp system.\textsuperscript{390}

Still, others have speculated that the Supreme Court’s order constitutes a signal that the Court is seeking an opportunity to dissolve the facility at Guantanamo Bay altogether.\textsuperscript{391} If this was indeed the motivation behind the Supreme Court’s grant of certiorari, it would be quite remarkable given the fact that three justices in the \textit{Hamdan} majority joined Justice Breyer’s concurrence and expressly invited Congress to authorize the military commissions.\textsuperscript{392} Nevertheless, because the Supreme Court did not indicate how the individual justices voted to grant certiorari, it is impossible to know with certainty what prompted such a change of course.\textsuperscript{393}

\textsuperscript{387.} See William Glaberson, \textit{In Shift, Justices Agree to Review Detainees’ Case}, N.Y. TIMES, June 30, 2007, at A1. The Supreme Court will grant plenary review of a certiorari case if a minimum of four justices favor granting the petition.


\textsuperscript{389.} Appendix to Reply Brief of Petitioners to Opposition to Petition for Rehearing, at i-viii, Al Odah v. United States, 75 U.S.L.W. 3707 (U.S. 2007) (No. 06-1196).

\textsuperscript{390.} \textit{Id.} Even assuming the truth of Abraham’s allegations, these allegations do not make the process itself unlawful. If there are abuses of the system, these need to be corrected but they do not invalidate the system itself.

\textsuperscript{391.} Carol Rosenberg, \textit{Supreme Court to Review Guantanamo Detainee Case}, CHATTANOOGA TIMES FREE PRESS, June 30, 2007, at A1. It is the view of the writers of this law review article that significant harm would result from closing the Guantanamo Bay facility and integrating detainees into American prisons. Consider, for example, the mayhem that resulted when Irish Republican Army members were interned at the Maze Prison near Lisburn, County Antrim. The Maze Prison, which housed the bulk of the paramilitary prisoners among some of the "most hardened killers and bombers," is known for events that "reverberated far beyond the walls of its notorious H-blocks," including the dirty protest, hunger strikes, murders, riots, and, most notably, the largest break-out of prisoners. \textit{See Doors closing for last time at “unique” prison, CNN, available at http://www.cnn.com/SPECIALS/2000/n ireland/maze.html.}

It would be irresponsible to integrate those detained at Guantanamo into the United States prison system. According to John B. Bellinger III, senior legal advisor to Secretary of State Condoleezza Rice, roughly ten percent of the hundreds of individuals who have been released from Guantanamo have returned to fight against the United States in Afghanistan. Embassy of the United States, Press Release, Releasing Guantanamo Detainees Would Endanger World, U.S. Says, May 25, 2006, available at http://london.usembassy.gov/terror670.html.


\textsuperscript{393.} \textit{Hamdan}, 548 U.S. 557, 652.
A year later, in June 2008, the United States Supreme Court heard Boumediene’s case. Justice Kennedy delivered the opinion for the 5-4 majority, which held that federal courts have jurisdiction over petitions for writs of habeas corpus filed by aliens captured abroad and detained as unlawful enemy combatants at Guantanamo. According to the Court, the portion of the MCA of 2006 that deprived detained prisoners of the right to seek habeas corpus in the federal courts violated the Suspension Clause of the United States Constitution. The Suspension Clause provides: “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” After tracing the historical roots of the Suspension Clause, the majority noted that:

[At least three factors are relevant in determining the reach of the Suspension Clause: (1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner’s entitlement to the writ.]

Critical to the Court’s analysis was the status of the detainees. Although not American citizens, the detainees vigorously disputed that they are enemy combatants. In the absence of a finding (presumably after a full trial) that they were enemy combatants, this factor weighs against a conclusion that the detainees have rights under the Suspension Clause. The court next noted that a second factor relevant to its analysis was that the detainees, while technically outside the sovereign territory of the United States, were for all practical purposes within the constant jurisdiction of the United States. This factor further weighed in favor of a finding that the detainees have rights under the Suspension Clause. Finally, with respect to the third factor, the Court recognized the costs of holding the Suspension Clause applicable in a case of military detention abroad; however, while noting its sensitivity to these concerns, the Court did not find them dispositive. For these reasons, the Court held that “Art. I, § 9, cl. 2, of the Constitution has full effect at Guantanamo

396. Id. at 733.
399. Id.
400. Id. at 766-767.
401. Id. at 767.
402. Id. at 768.
403. Id.
404. Boumediene, 553 U.S. at 769.
Therefore, the detainees are “entitled to the privilege of habeas corpus to challenge the legality of their detention.”

E. Military Commissions Act of 2009

After the 2008 presidential election and Barack Obama’s inauguration as the forty-fourth President of the United States, the United States’ policy with respect to those accused of terrorism and detailed at Guantanamo changed ever so slightly. After taking office in 2009, President Obama temporarily stayed military commissions so that he and Congress could review the procedures in place. The newly elected President vowed that he would close Guantanamo by January 2010 and issued an Executive Order requiring that the detention facility be closed no later than a year from the date of the Order, which was signed on January 22, 2009. The Order instructed officials to review those detained at Guantanamo and to assess whether the detainee should be “returned to their home country, released, transferred to a third country, or transferred to another United States detention facility in a manner consistent with law and the national security and foreign policy interests of the United States.”

In May 2009, the Obama Administration announced that it was considering lifting its stay of the military commission system. In response, the House of Representatives passed the Military Commissions Act of 2009 (MCA of 2009), which amended the MCA of 2006, and was aimed at affording detainees enhanced due process protections. Although the MCA of 2006 was enacted by President Bush and was the subject of sharp criticism from Democrats, the new law enacted by President Obama did not make any radically different changes. Rather, the MCA of 2009 retained the basic structure of the existing commissions. The new law excluded from evidence statements obtained through torture or cruel, inhuman or degrading treatment – likely aimed at preventing statements resulting from waterboarding. Importantly, however, the law empowered the Secretary of Defense to enact rules permitting admission of coerced statements and hearsay evidence. The MCA of 2009 gave each defendants the right to attend his trial in its entirety, the right to examine all evidence presented against him, and the right to call his own witnesses or cross-examine the government’s witnesses.

405. Id. at 771.
406. Id.
409. Id. at §§ 3-4.
The MCA of 2009 permits defendants who are found guilty to appeal that finding to the United States Court of Military Commission Review, to further appeal to the United States Court of Appeals for the District of Columbia, and then finally to the United States Supreme Court by writ of certiorari. In enacting the new law, Congress granted the commission jurisdiction over thirty two crimes, which include pillaging, taking hostages, torture, mutilation, rape, conspiracy and providing material support for terrorism. In accordance with the newly enacted law, on May 4, 2010, a 281-page set of procedures was released, specifying the manner in which military commissions may be conducted.

F. Hamdan’s Trial by Military Commission

Although the United States Supreme Court in Hamdan had held that Hamdan’s military commission was unconstitutional, in light of the MCA, Hamdan was tried by military commission and sentenced to sixty-six months of confinement. Hamdan received sixty-one months and seven days credit for time already served and, in November 2008, was released to his native Yemen for the remaining weeks of his confinement. Meanwhile, however, Hamdan’s lawyers sought review of his conviction in the United States Court of Military Commission Review. On appeal, they argued that the military commission established pursuant to the Define and Punish clause of the Constitution lacked jurisdiction over the offense with which Hamdan was charged – providing material support for terrorism – because such a crime is not a violation of the international law of war. They further argued that Hamdan’s conviction was the result of an ex post facto prosecution prohibited by the Constitution and the international law because the MCA was signed into law after the conduct that formed the basis of the charges against Hamdan. Finally, they claimed that the MCA violates the Constitution by making aliens but not citizens subject to trial by military commission.

The United States Court of Military Commission Review rejected Hamdan’s challenges and affirmed his conviction and sentence. In rejecting Hamdan’s challenges, the court went to great length to detail in its 86-page decision the

415. Id. at *20.
416. Id. at *19-20.
417. Id. at *20.
418. Id.
419. Id. at *20.
history of the use of military commissions, which informed the basis for its decision.\footnote{See generally \textit{Hamdan}, 2011 U.S. CMCR LEXIS 1.} The court held that “Congress exercised authority derived from the Constitution to define and punish offenses against the law of nations by codifying an existing law of war violation in a clear and comprehensively defined offense of providing material support to terrorism.”\footnote{Id. at *189.} The court looked by analogy to historical treatment of the laws of war and concluded that crimes equivalent to the offense of providing material support for terrorism have long been tried by military commissions.\footnote{Id. at *189-92.}

With respect to Hamdan’s \textit{ex post facto} argument, the Court held that changes to judicial tribunals, venue and jurisdiction do not violate the Ex Post Facto Clause because “[c]reation of a new court to assume the jurisdiction of an old court does not implicate ex post facto prohibitions so long as the ‘substantial protections’ of ‘the existing law’ are not changed to the prejudice of the accused.”\footnote{Id. at *186 (citing Duncan v. Missouri, 152 U.S. 377, 382-83 (1894)).} The court reasoned that application of a new jurisdictional rule does not take away any substantive rights of the accused and, therefore, does not constitute a violation of the Ex Post Facto Clause.\footnote{Id. at *187.}

The court also declined to find a violation of the Equal Protection Clause by virtue of the fact that aliens are treated different than United States citizens. The court held that Congress had a rational basis for the disparate treatment of aliens and that disparate treatment does not violate the Equal Protection Clause of the Constitution.\footnote{Id. at *221.}

\section*{VIII. TODAY’S MILITARY COMMISSIONS}

Markedly different from the military commissions of the Mexican War and the Civil War, today’s military commissions bear a striking resemblance to proceedings before the United States district courts.\footnote{See generally \textit{Hamdan}, 2011 U.S. CMCR LEXIS 1.} Military commission judges are required to have the same qualifications as judges who preside over courts-martial.\footnote{Id. at *187.} Those who come before the court are automatically assigned military counsel, who are required to have the same credentials as defense counsel in court-martial proceedings.\footnote{Id. at *221.} The accused also may elect to be represented by civilian counsel.\footnote{See generally \textit{Hamdan}, 2011 U.S. CMCR LEXIS 1.} The jury is comprised of active-duty commissioned officers who are detailed to a commission based on a belief that
they are “best qualified for the duty by reason of their age, education, training, experience, length of service and judicial temperament.”

Military commission trials, like trials in the civilian court system, commence with opening statements, followed by the presentation of the Government’s case, and conclude with the accused’s defense. After both sides are permitted to make closing arguments, the military commission judge will instruct the commission members about the elements of the offenses, evidentiary matters and burden of proof. The members of the commission will then, like members of a jury, deliberate and decide in closed session over whether the Government has proven the accused’s guilt beyond a reasonable doubt. If the accused is found guilty, the commission members must determine the sentence. In those cases where the trial results in a finding of guilt, the record is then reviewed by the United States Court of Military Commission Review and the United States Court of Appeals for the District of Columbia Circuit.

Importantly, those accused and tried before military commissions are afforded a full panoply of rights. The compendium of rights to which an accused is entitled includes the right to: (1) be represented by counsel; (2) a public trial; (3) a panel of officer members, selected after a process of voir dire and challenge; (4) compulsory process for the production of witnesses in his defense; (5) limitations on the admissibility of evidence under rules similar to the Military Rules of Evidence; (6) raise affirmative defenses such as are common in criminal trials; (7) be found guilty only if two-thirds of the members present at the time of balloting find him guilty beyond a reasonable doubt; (8) have the assistance of counsel in submitting a position for clemency to the convening authority and filing an appeal; (9) have the findings and sentence reviewed by a convening authority and his or her legal advisor, who in the convening authority’s sole discretion can grant clemency (including setting aside the findings of guilt, charging them to findings of guilt to a lesser offense, and reducing or setting aside the sentence) for any reason or for no reason at all; (10) an automatic appeal to the United States Court of Military Commission Review; and (11) review by the United States Court of Appeals for the District of Columbia Circuit. The United States Supreme Court is authorized to review by writ of

431. Id. (citing 2007 M.M.C., Rule for Military Commissions 502(a)(1); MMC (2008), Rule for Courts-Martial 502(a)(1)).
432. Id. at *28.
434. Id.
435. Id.
436. Id. at *29 (citing 2006 and 2009 M.C.A. § 950(b), § 950(f) and § 950(g)).
IX. CONCLUSION

Today, the nation finds itself questioning the Government’s policies concerning military tribunals. Despite the passage of time, the questions themselves are the same as those asked during the Civil War: Are we at war? Is it appropriate to try enemy combatants, removed from the field of battle, in military, as opposed to civilian courts? And, if so, what would constitute constitutional due process? How can we ensure that trials protect the civil liberties of the accused, while protecting our national security?

Arguably, we are a nation at war. In an age when wars are not always fought on battlegrounds and often involve covert underground intelligence operations, to assume that we are not at war because the government has difficulty defining those entities against which we are fighting would surely transform the Suspension Clause into a hollow provision. There is no basis for believing that the framers of the Constitution intended that habeas corpus be suspended only after a formal declaration of war or during a civil war. In its history, the United States has only formally declared war five times. It strains credulity to believe that President Bush’s Authorization for Use of Military Force was not a declaration of war.

Although military commissions have evolved considerably from the dark days of the Civil War, they still face sharp criticism, perhaps due to the stigma associated with them, as well as alleged acts of torture and indefinite detention of detainees at Guantanamo Bay. Nevertheless, in the current wartime climate, amidst the terror that has jeopardized our country and other nations, it is necessary and appropriate to try enemy combatants, removed from the field of battle, in military, as opposed to civilian courts. Today’s critics advocate for the closure of Guantanamo but it is important to recognize that it is not Guantanamo that is the lightening rod. Whether such trials take place in Guantanamo, on United States soil, or anywhere else, the rights afforded during those trials are what matter. It is nearly impossible when a nation is at war to afford enemy combatants all rights available to civilian courts, but, this does not mean that all rights must or should be sacrificed.

The MCA of 2009 affords enemy combatants a panoply of rights and rights far more abundant than were afforded to enemy combatants during the Civil War. As an additional procedural safeguard, President Obama has maintained a

438. Id. at 29 (citing 2006 and 2009 M.C.A. § 950(g)(e)).
439. There were declarations of war with respect to the War of 1812, the Mexican War, the Spanish-American War, World War I, and World War II. Congress’ role in war, U.S.A. TODAY (May 18, 2005), available at http://www.usatoday.com/news/nation/2002-10-08-congress-war.htm.
440. For example, it is impossible to afford enemy combatants the right to a trial by a jury of his or her peers in a wartime climate.
presidential check on the military commission system just as Lincoln did during the Civil War. He has directed that each detainee’s case be reviewed to determine those who can be repatriated to third-party nations or referred to American civilian courts.\textsuperscript{441} For example, Obama personally reviewed the case of Ali al-Marri who was detained without a charge in a military jail in South Carolina.\textsuperscript{442}

As Justice Oliver Wendell Holmes wisely noted, “\textit{[w]hen a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.}\textsuperscript{443} This was true during the Civil War, during the subsequent trials of President Lincoln’s conspirators and it remains true today.


\textsuperscript{443} Schenck v. United States, 249 U.S. 47, 52 (1919) (emphasis added).
THE CIVIL WAR ORIGINS OF THE MODERN RULES OF WAR:
FRANCIS LIEBER AND LINCOLN’S GENERAL ORDER NO. 100

Burrus M. Carnahan*

“Ever since the beginning of our present War, it has appeared clearer and clearer to me, that the President ought to issue a set of rules and definitions providing for the most urgent cases, occurring under the Laws and Usages of War . . . .” Dr. Francis Lieber to Major General Henry Halleck, November 13, 18621

The “present War” to which Dr. Lieber referred was, of course, the American Civil War, then in its second year. In the mid-nineteenth century, the “laws and usages of war” were a set of rules and legal principles, largely unwritten, which governed the conduct of armies engaged in international wars among Europeans and other Western nations.2 The twenty-first century international law of war, also referred to as international humanitarian law, is a direct descendant of these early laws and usages of war.3

Lieber’s suggestion to General Halleck raises a number of questions, which this paper will seek to answer. Initially, why did Lieber believe that the U.S. Army needed presidential guidance on the rules for international wars, when the only war the United States was engaged in was an internal, non-international armed conflict? How did the government respond to Lieber’s suggestion? How had the laws and usages of war developed up to the time of the Civil War? Finally, and most significantly, how did Lieber’s initiative influence the future development of international humanitarian law?

I. THE CHALLENGE: APPLYING INTERNATIONAL LAW IN A CIVIL WAR

Throughout the Civil War, it was the Lincoln administration’s position that States could not secede from the Union, that the Confederate government had no legal status, and that therefore the U.S. government

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1. Letter from Lieber to Halleck (Nov. 13, 1862), reprinted in Richard Shelly Hartigan, Lieber’s Code and the Law of War, 79-80 (Precedent 1983). In November 1862, Francis Lieber (1798-1872) was a professor at Columbia University and Henry Halleck (1815-1872) was commanding general of the United States Army.
2. Hartigan, supra note 1, at 4-6.
3. Hartigan, supra note 1, at 4-6.
was fighting a vast criminal conspiracy of insurrectionary individuals rather than a hostile government. The Confederate government, of course, took the opposite view, and insisted it was a sovereign nation at war with another sovereign nation, and was therefore entitled to all the rights of a belligerent state under the international laws and usages of war. While the official position of the Lincoln government never changed, as a practical matter, through a combination of pressure from neutral nations, Confederate threats of retaliation and domestic pressure to ensure that U. S. soldiers were treated as prisoners of war, the Union was gradually forced to accord Confederate military forces all the rights of a legitimate enemy under international law. This de facto change in policy was fully in effect by the beginning of 1862.

This gradual shift towards applying international law raised a more difficult problem for the Union government – ensuring that the laws and usages of war were actually applied by U.S. officers in the field. At the beginning of the War there were 16,000 officers and men in the U.S. Army. By May 1865, the strength of the Union armies stood at approximately one million officers and men, and during the course of the War over two million men would serve in the Union armies for some period. Officers of the Regular Army learned the rules of war at West Point, through professional reading of military history or through on-the-job education in the field. The rapid and vast expansion of the Union army during the Civil War meant that most officers had to be appointed from civilian life, and had no knowledge of U.S. military law or the international laws of war. This was the problem that Dr. Lieber identified to General Halleck in November 1862, and that the two would collaborate in trying to solve.

In retrospect, it was clear that Henry Wager Halleck had been appointed commanding general of the U.S. Army by mistake. An 1839 graduate of West Point, he gained a reputation as a military intellectual after publishing a treatise entitled Elements of Military Art and Science in 1846. He saw combat in some minor skirmishes during the war with Mexico, but resigned his commission after that war to pursue a successful

6. Eicher, supra note 5, at 785; Farwell, supra note 5, at 836.
7. Eicher, supra note 5, at 247.
9. See Farwell, supra note 5, at 383.
law practice in California. He continued his academic writing, and published a respected treatise on international law shortly before the Civil War. Returning to the army at the start of the War, he was appointed a Major General. In late 1861 he was placed in command of the Military Department of the Missouri, with headquarters at St. Louis. In that position he received credit for several victories won by his subordinates, most notably General Ulysses Grant’s capture of Fort Henry and Fort Donelson, which led the Confederates to abandon most of Tennessee, and General John Pope’s capture of Island Number 10, an important fortified post in the Mississippi River. Halleck did, however, personally lead a campaign that captured the Confederate base at Corinth, Mississippi.

From the perspective of Washington, a thousand miles to the east, Halleck appeared to be a vigorous and skilled commander, especially as compared with the cautious Major General George B. McClellan, whom Robert E. Lee had driven back from the gates of Richmond at the end of June and beginning of July 1862. The Washington authorities failed to note that during the Corinth campaign General Halleck had taken more than a month to advance the 30 miles between his base on the Tennessee River and the outskirts of Corinth. The Confederates had evacuated before his army arrived.

On July 2, 1862, Halleck was summoned to the capital to become the commanding general of the U.S. Army. President Lincoln and his cabinet eventually discovered their mistake. When the President asked Halleck for his professional opinion on General Burnside’s planned attack on Fredericksburg, he refused to take a firm position pro or con. “If in such a difficulty as this you do not help,” Lincoln complained to Halleck, “you fail me precisely in the point for which I sought your assistance,” but the general continued to dither. Secretary of the Navy Gideon Welles wrote in his diary that Halleck “originates nothing, anticipates nothing . . . takes no responsibility, plans nothing and is good for nothing.”

10. Farwell, supra note 5, at 383.
12. Farwell, supra note 5.
14. Id. at 117, 122.
15. Id. at 123-24.
16. Id. at 126.
17. Id. at 124-25.
18. Id. at 125-26.
21. Id.
22. Farwell, supra note 5, at 383.
eventually concluded that as commanding general, Halleck was little better than “a first rate clerk,” but kept him on because no better alternatives were available.23

Even as a “first rate clerk,” however, General Halleck contributed to the Union war effort. He was a skilled and careful bureaucrat, and it was this quality that brought his mind into line with the thinking of Frances Lieber. As his most recent biographer has observed, Commanding General Halleck had an “obsession with administration,” and by early 1863 was “worried about the lack of definitive regulations for fighting a civil war.”24

He now felt the need for well-thought-out regulations for the American war, but he was too busy to produce them himself. He noted with interest a series of eight lectures in late 1861 and early 1862 given by Francis Lieber, a Columbia University professor . . . .25

The relationship between Halleck and Lieber, both respected authorities on international law, went back several years.26 In addition to their earlier correspondence during the Civil War, they had dined together in New York in the 1840s.27 Halleck eventually called on Lieber to produce the regulations he desired, just as Lieber had proposed in his letter of November 13, 1862.28

II. THE BACKGROUND OF FRANCIS LIEBER

As a distinguished scholar who had himself seen the horrors of war, and who understood both Abolitionist New England and the plantation society of the deep South, Lieber was the ideal person to carry out this project. A Prussian by birth, he enlisted in the Colberg Regiment to fight in the final campaign of the Napoleonic Wars, where he first saw heavy

23. Farwell, supra note 5, at 383.
24. Marszalek, supra note 13, at 166. Halleck was not the first officer to have noted this need. As early as July, 1861, when the federal government was still in the process of establishing policies on the treatment of Confederate prisoners of war, Quartermaster General Montgomery Meigs warned the Secretary of War that “Knowledge of military law and custom is needed in order not to offend by errors of ignorance in treating these delicate questions.” Letter from Meigs to Cameron (July 12, 1861), reprinted in WAR OF THE REBELLION: OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES (U.S. Govt Printing Office, 1880-1901), ser. 2, vol. 3, at 8.
25. Marszalek, supra note 13, at 167. The lectures, delivered at the Columbia University Law School in the winter of 1861-62, were on “The Laws and Usages of War.” See FRANK FREIDEL, FRANCIS LIEBER, NINETEENTH CENTURY LIBERAL 334. (P. Smith 1968). Halleck wrote to request a copy of the lectures, but Lieber had to decline since he did not have them in printed form. Letter from Lieber to Halleck (July 23, 1862), reprinted in RICHARD SHELLY HARTIGAN, LIEBER’S CODE AND THE LAW OF WAR, 74-75 (Precedent 1983).
27. Marszalek, supra note 13, at 167.
28. Marszalek, supra note 13, at 167-68.
combat at the battle of Ligny.\textsuperscript{29} At one point he had to help roll a cannon over the mangled bodies of French and German wounded, an act that “impressed itself with indelible horror” on his mind.\textsuperscript{30} He was himself shot in the neck and chest at the battle of Namur.\textsuperscript{31} Left on the battlefield for hours of agony without treatment, Lieber was finally saved that night by peasants who had come to loot the dead.\textsuperscript{32}

After the war Lieber returned to liberal political activism, and tried to return to academic life.\textsuperscript{33} However, the Prussian police had come to regard him as a subversive element, and pressured German universities to refuse him admission.\textsuperscript{34} In 1820 he received a Ph. D. degree from the University of Jena, but continual police harassment led him to leave Germany.\textsuperscript{35} Like many young men of the Romantic Era, he traveled to Greece in 1821 to assist its fight for independence from the Ottoman Empire.\textsuperscript{36} The experience was thoroughly disillusioning, because most of the Greeks seemed more interested in extracting money from the foreign volunteers than fighting for their own freedom.\textsuperscript{37} Lieber’s disappointment may later have affected his attitudes towards guerrillas and other irregular fighters.

Impoverished when he left Greece, Lieber finally found a position as tutor to the son of the Prussian Minister at Rome.\textsuperscript{38} The Minister, an eminent historian named Barthold Niebuhr, became Lieber’s mentor.\textsuperscript{39} An admirer of Edmund Burke, Niebuhr was a strong believer in the orderly evolution of political institutions, rather than violent revolution, as the key to attaining constitutional liberty.\textsuperscript{40} He passed these moderate ideas on to Lieber and stimulated his interest in political science.\textsuperscript{41} However, on returning to Prussia, Lieber found that even Niebuhr’s sponsorship could not protect him from renewed police harassment.\textsuperscript{32} Unable to secure an academic position due to official suspicion, in 1826 he moved to Great Britain, where he became engaged to Matilda Oppenheimer, daughter of a

\begin{itemize}
  \item \textsuperscript{29} See Frank Freidel, Francis Lieber, Nineteenth Century Liberal 11-14 (P. Smith 1968).
  \item \textsuperscript{30} Id. at 14.
  \item \textsuperscript{31} Id. at 15-16.
  \item \textsuperscript{32} Id. at 16.
  \item \textsuperscript{33} Id. at 19-26.
  \item \textsuperscript{34} Id. at 26-27.
  \item \textsuperscript{35} Frank Freidel, Francis Lieber, Nineteenth Century Liberal 28 (P. Smith 1968).
  \item \textsuperscript{36} Id. at 30.
  \item \textsuperscript{37} Id. at 24-34.
  \item \textsuperscript{38} Id. at 36.
  \item \textsuperscript{39} Id. at 35-37.
  \item \textsuperscript{40} Id. at 37.
  \item \textsuperscript{41} Frank Freidel, Francis Lieber, Nineteenth Century Liberal 37 (P. Smith 1968).
  \item \textsuperscript{42} Id. 41-45.
\end{itemize}
well-to-do German émigré. 43 Unable to find a position that would allow him to support a family, in 1827 he migrated to the United States and settled in Boston. 44

In New England he made important intellectual and political contacts, including U.S. Supreme Court Justice Joseph Story and future U.S. Senator, and ardent abolitionist, Charles Sumner. 45 Again, he was unable to find a permanent academic position. 46 In 1828 he finally attained a degree of financial stability when he found a publisher willing to back his proposal to create the *Encyclopedia Americana*, with Lieber as the editor and compiler. 47 Matilda arrived the following year and they were married soon after, though he still lacked a reliable source of long-term income. 48 In 1835, Matilda was pregnant with a second child, but Lieber still had no academic prospects in the North. 49 Faced with this situation, he accepted a position as professor of political economy at South Carolina College, where he remained until 1855. 50

As an ardent Unionist and critic of slavery, Lieber did not find a compatible intellectual environment in Columbia, South Carolina. 51 To retain his position he kept his views to himself, while continuing to seek a position in a northern college or university. 52 In at least one respect his effort to blend in went too far—Lieber rented and purchased slaves as household servants. 53 Despite his discomfort with the cultural environment, during this period Lieber produced a lengthy treatise entitled *Manual of Political Ethics* that brought him national attention as a serious scholar. 54 The treatise included a chapter on the conduct of warfare, which provided the foundation for his later work on that subject. 55 Lieber’s principal biographer has claimed that “[t]he international law of war followed by most belligerents in the two world wars of the twentieth century are directly traceable to the last chapter of the *Political Ethics*.” 56 Lieber finally resigned from South Carolina College in 1855 after failing to be elected president of the institution, at least in part because he was

43. *Id.* at 47.
44. *Id.* at 52.
45. *Id.* at 69, 109.
46. *Id.* at 56-62.
47. FRANK FREIDEL, FRANCIS LIEBER, NINETEENTH CENTURY LIBERAL 66 (P. Smith 1968).
48. *Id.* at 71-72.
49. *Id.* at 118-119.
50. *Id.*
51. *Id.* at 130
52. *Id.* at 130-141.
53. FRANK FREIDEL, FRANCIS LIEBER, NINETEENTH CENTURY LIBERAL 235-36 (P. Smith 1968).
54. *Id.* 144-170.
55. *Id.* at 163.
56. *Id.* at 163.
suspected of being a secret abolitionist. He returned to the North and two years later was appointed professor of history and political science at Columbia College, soon to become Columbia University.

The outbreak of the Civil War would provide Francis Lieber with the opportunity to make his most significant contribution to international law, but it also divided his family. Oscar, his oldest son, who had remained in South Carolina, joined the Confederate army, while his other two sons, Norman and Hamilton, joined the Union army. Oscar would be killed in action at the battle of Williamsburg in 1862, while Hamilton was wounded and lost an arm at the battle of Fort Donalson earlier that year. While traveling west to visit his wounded son, Lieber renewed his acquaintance with General Halleck, then in command of the Department of the Missouri.

Lieber established other important professional contacts in Washington early in the War. He advised his old friend Charles Sumner, chair of the Senate Foreign Relations Committee, on issues of international and constitutional law throughout the War. In June 1861 he traveled to the White House to present President Lincoln with an honorary LL. D. degree from Columbia University, and during the course of the trip met Attorney General Edward Bates. Bates later sought his advice on legal issues, including whether it was proper to apply the international law of war in the current conflict. Lieber assured the Attorney General that the United States could apply international law to the enemy as a humanitarian gesture without according any political legitimacy to the Confederate government, a view eventually adopted as the official position of the U.S. government.

III. THE DOCTOR AND THE GENERAL: BIRTH OF THE LIEBER CODE

In July 1862 Lieber wrote Halleck to congratulate him on his promotion to commanding general of the army, and mentioned that he was
undertaking a study of “the very important question of Guerrilleros.” Halleck, who had faced a guerrilla epidemic during his command of the Department of the Missouri, immediately expressed interest in the doctor’s research.

I am very anxious to see your views of guerrilla war, as I hear that you are writing on that subject. I treated it very briefly in my book, not expecting at that time that we should ever have guerrillas in the U. States. It has now become an important question in this country and should be thoroughly investigated. I know of no one who can do it as well as yourself.

As a result of this correspondence, Lieber drafted and submitted to Halleck a sixteen-page pamphlet, Guerrilla Parties Considered with Reference to the Laws and Usages of War. In keeping with his background as a nineteenth century German scholar, Lieber focused on developing correct and precise definitions of the various participants in hostilities. Spies (who gathered information clandestinely behind enemy lines), rebels in occupied territory, and brigands (soldiers who took property or killed without military authority) were not entitled to prisoner of war status on capture, and could be punished for their acts of violence. On the other hand, civilians in territory not yet occupied by the enemy, who rise in arms to resist invasion, should be treated as legitimate combatants. Partisans, defined as uniformed soldiers who operate behind enemy lines, were also legitimate. Guerrilla parties, on the other hand, were “self-constituted sets of armed men,” not part of an army, who “take up arms and lay them down at intervals” so as to blend in with the
civilian population. In principle they were not entitled to the treatment of prisoners of war. However, if captured while cooperating with the enemy regular army in open battle, Lieber found that most “humane belligerents in recent times” would grant them prisoner of war status. Halleck was delighted with the pamphlet and ordered 5,000 copies printed and distributed to commanders in the field.

Lieber followed this success with his November 13 proposal to draw up a more complete set of “rules and definitions” to be used in the field as a guide to the laws and usages of war. Halleck agreed that the Union war effort needed such guidance, and in early December, he telegraphed Lieber to come to Washington at once and be prepared to stay for at least a month. On December 17, 1862, War Department orders appointed Lieber and four generals to a board “to propose amendments or changes to the 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.” The generals decided they would undertake revision of the Articles of War, and left the codification of the laws and usages of war to Dr. Lieber, who, drawing on his earlier research for Manual of Political Ethics, had a draft ready by February 1863. The other members of the board and General Halleck made slight modifications, after which it was signed by President Lincoln and issued as War Department General Orders No. 100, with an official date of April 24, 1863. It has since been generally referred to as

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74. Id. at 41.
75. Id.
76. Id. at 42.
77. See Marszalek, supra note 13, at 167.
78. Id.
79. Id. at 168.
81. See Marszalek, supra note 13, at 167-68; Freidel, supra note 62, at 331-34.
the “Lieber Code.”

One legal historian has described the final product as follows:

The Lieber Code may be said, without undue exaggeration, to be something of a legal masterpiece—a sort of pocket version of Blackstone’s famous Commentaries on the Laws of England, though confined to the particular subject of the laws of land warfare. It is not simply a list of rules, as might be implied by the label “code.” It was, in addition, a miniature commentary on those rules, explaining, if only in the briefest terms, the basic principles underlying the specific commands and prohibitions. As such, it made a lasting contribution to the development of the subject.

The Lieber Code had an influence on the development of the law of war far beyond what would ordinarily be expected of a single military order issued by a government in a civil war. In part this was because it was issued at a pivotal moment in the history of the law of war, and of international law in general. It was also due in part to the methodology Dr. Lieber used in compiling his Code. To understand this requires examination of the earlier history of the law of war.

A. Historic Roots of the Laws and Usages of War

The roots of the modern law of war lie deep in the European Middle Ages, in two complementary bodies of law – the canon law of the church, and the international law of arms applicable to knights and the nobility. Very early in the medieval period, churchmen began to develop what is known today as the “principle of distinction.” This principle distinguished armed combatants from civilians, to the end that the latter be spared the rigors of war as much as possible. As early as 697, Abbot Adomnan of the monastery at Iona organized a conference of petty Irish kings, who swore to uphold the “Law of the Innocents,” a document that prohibited killing women, clerics and males below fighting age. In the tenth and eleventh centuries, church councils and synods in France promoted the “Peace of God,” which condemned attacks on clerics, merchants, pilgrims, peasants and women. Around 1140, some of these

84. Id. at 57-58.
86. Id.
prohibitions were included in the monk Gratian’s great compendium of canon law, the Decretum, which prescribed excommunication for persons who attacked noncombatants in the protected categories. These rules were reaffirmed for all Christians in Western Europe by the Third Lateran Council in 1179. Additionally, canon law also stressed that a just war could only be waged with official approval of a sovereign ruler.

The “law of arms” reflected the ideals of medieval chivalry, and applied only to relations between those members of medieval society who had the right to bear arms and participate in just wars, e.g., knights and members of the nobility. Peasants who took up arms on their own were by definition unlawful belligerents, an attitude that, coupled with the canon law emphasis on the need for princely authority to wage a just war, is probably the initial manifestation of the hostility of regular armies to guerrilla warfare over the centuries. The law of arms reflected many of the rules of the canon law, namely protection of peasants, churches, pilgrims and clerics; and it contained additional rules to prohibit treachery, protect heralds and messengers between opposing armies, and to give guidance on disposing of booty, respecting safe conducts and the ransom of noble captives.

Violation of the law of arms had serious consequences. In 1474, Sir Peter von Hagenbach was tried and convicted by a court convened by the Archduke of Austria for murder, rape, illegal taxation and other atrocities Hagenbach and his soldiers committed while he was governor of the city of Breisach am Rhein. Prior to his beheading, Hagenbach was formally stripped of his knighthood, because as a knight he had a duty under the law of arms to prevent such offenses, not commit or encourage them. In modern times this decision is often cited as the first case tried by an

91. See, e.g., Russell, supra note 90, at 63, 68, 128.
93. See Christine de Pizan, The Book of Deeds of Arms and of Chivalry, 152-196 (ca. 1410, Summer Willard trans., Penn State Press 1999); Contamine, supra note 88, at 289-90. Christine de Pizan (ca. 1364 – ca. 1430) was the well-educated daughter of the official astrologer of the King of France. Left a widow with three small children at age 25, she successfully supported herself as a writer, perhaps the first woman in Europe to do so. Her works included poems, songs, and prose fiction and nonfiction. See Danuta Bois, Christine de Pizan, http://www.distinguishedwomen.com/biographies/pisan.html (last visited Sept. 24, 2011). She may have been commissioned by the Duke of Burgundy to write The Book of Deeds of Arms and of Chivalry for study by Louis of Guyenne, the heir to the French throne. The Duke of Burgundy was in charge of educating Prince Louis. See Charity Cannon Willard, de Pizan, supra at 3-6.
95. Id.
international war crimes tribunal, and an early rejection of the defense of superior orders.96

While the law of arms purported to respect the canon law rules protecting peasants and other commoners, by the fifteenth century it contained major loopholes that undercut those rules in most practical situations. For example, when considering whether is was lawful to capture unarmed peasants in enemy territory, Christine de Pizan answered that if they “gave aid and comfort to maintain the war,” they and their property were subject to seizure, while reminding the reader that in doing this “good gentlemen-at-arms must take every precaution not to destroy the poor and simple folk, or suffer them to be tyrannized or mistreated.”97 If this reasoning was applied strictly, any peasant who paid taxes in kind to his feudal overlord, in turn supported the enemy king. Thus, the peasant lost immunity from the rigors of war. In the end, the nobility developed chivalry for the nobility, not for the peasants or merchants.

The authority of the law of arms eroded in the fifteenth century from the increased use of mercenaries, who cared nothing for chivalry, and from the rising military importance of citizen militias in Switzerland and the commercial cities of Europe.98 In parallel, the universal authority of canon law disappeared with the Reformation and the religious wars of the sixteenth and seventeenth centuries.99 Beginning with Hugo Grotius in the seventeenth century and continuing into the Enlightenment era of the early eighteenth century, scholars rebuilt the laws of war, while maintaining many of the old rules (e.g., not using poisoned weapons), on the new foundation of “natural law,” discoverable by the application of reason, supplemented, according to some writers, by the actual practice of sovereigns.100 The last quarter of the eighteenth century, however, saw the rise, particularly in Germany, of “positivism” as a new theory of international law that centered its study on the rules that sovereigns


97. De Pizan, supra note 93, at 171-72. Aid and comfort included giving advice or information to aid the war. De Pizan, supra note 93, at 176-78.

98. See Contamine, supra note 88, at 290-92. Christine de Pizan, who wrote during the vicious Hundred Years War between England and France, recognized that the rules of chivalry were dying in her day. “[N]o longer are the noble early rights preserved that the valiant warriors observed. Those who follow the military custom in the present time abuse it through the enormous greed that overcomes them.” De Pizan, supra note 93, at 177.

99. De Pizan, supra note 93, at 177.

100. See JAMES L. BRIEPLY, THE LAW OF NATIONS 27-40 (Oxford at the Clarendon 1963); Nussbaum, supra note 90, at 135-41, 147-64.
actually considered legally binding in practice, with only an occasional bow to natural law to fill in the gaps.\footnote{101}

In the nineteenth century, positivism gradually became the predominant legal theory.\footnote{102} In Europe, the prestige of natural law suffered an initial blow from its association with the French Revolution, which had brought the Terror to the people of France and 25 years of war to the rest of the continent.\footnote{103} The final blow was delivered by the rise of modern natural science. Natural law scholars reasoned \textit{a priori} from assumptions about human nature.\footnote{104} Natural scientists reasoned from empirical evidence gathered in the field or by experiment, and had thereby greatly expanded human knowledge of the physical world.\footnote{105} European legal scholars sought to place their discipline on the same prestigious scientific basis as their colleagues in physics and chemistry.\footnote{106} This movement was gaining predominance at about the same time the Lieber Code was published.

\subsection*{B. Lieber’s Empirical Methodology}

While Francis Lieber appears to have always regarded himself as operating in the natural law school of legal theory, in practice his methods were thoroughly empirical. Barthold Niebuhr, young Lieber’s mentor in Rome, had plausibly reconstructed the history and constitution of the ancient Roman Republic through critical analysis of all the surviving data, using new philological methods to determine the original meaning of ancient words.\footnote{107} Lieber absorbed Niebuhr’s emphasis on searching out a wide variety of source materials as a basis for scholarly inquiry.\footnote{108} Lieber dutifully followed this method in preparing the \textit{Manual of Political Ethics}.\footnote{109} His intention was to “introduce the empirical method to the

\begin{footnotes}
\footnote{101}{See Brierly, \textit{supra} note 100, at 43-44, 51-54; Nussbaum, \textit{supra} note 90, at 175-185. Note that Brierly is a critic of this development and regards the demise of natural law as weakening the international legal system.}
\footnote{102}{Brierly, \textit{supra} note 100, at 44.}
\footnote{103}{\textsc{Arthur} Nussbaum, \textit{A Concise History of the Law of Nations} 232-34 (Macmillan 1954).}
\footnote{104}{\textit{Id.}}
\footnote{105}{\textit{Id.}}
\footnote{106}{\textit{Id.} Natural law remained in favor in the United States for a longer period, probably due to its association the Declaration of Independence and the Founding Fathers of the republic. In the \textit{Prize Cases}, 67 U.S. 635 (1862), the U.S. Supreme Court still listed natural law as one of the foundations of international law. “The law of nations is also called the law of nature; it is founded on the common consent, as well as the common sense, of the world.” 67 U.S. at 670.}
\footnote{107}{See Frank Freidel, \textsc{Francis} Lieber, \textit{Nineteenth Century Liberal} 37-38 (P. Smith 1968).}
\footnote{108}{\textit{Id.}}
\footnote{109}{\textit{Id.} at 147.}
\end{footnotes}
study of political theory.” 110 Clipping periodical articles and writing government officials for copies of original documents, he gathered “tremendous quantities of material” that would provide a foundation of state practice for not only the Manual of Political Ethics, but also for later works including the Lieber Code. 111 In his Code, Francis Lieber tried to describe the rules that governments at war actually followed, not the rules he thought they should follow. A major reason the Lieber Code had such an extensive impact was that its summary of the laws and usages of war was empirically derived from military practice, with little reliance on natural law, and was issued at exactly the moment when such a study was in great demand.

A major problem with any empirically-based summary of the laws and usages of war is that it cannot prescribe rules for situations where there is no consistent evidence of state practice. In many situations, therefore, it may not be possible to offer military officers clear or useful guidance. An example may be found in one of the Code articles distinguishing lawful from unlawful guerrilla fighters, a subject Lieber had earlier tackled in his pamphlet Guerrilla Parties. 112

The Code defined “partisans” as “soldiers armed and wearing the uniform of their army, but belonging to a corps which acts detached from the main body for the purpose of making inroads into the territory occupied by the enemy.” 113 It followed the pamphlet by declaring that partisans were entitled to be treated as prisoners of war upon capture. 114 On the other hand, unlawful guerrillas are described as

[m]en, or squads of men, who commit hostilities, whether by fighting, or inroads for destruction or plunder, or by raids of any kind, without commission [from any government], without being part and portion of the organized hostile army, and without sharing continuously in the war, but who do so with intermitting returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful

110. Id.
111. Id. at 148. Lieber’s biographer, who scoured his research papers at the Huntington Library in California, commented that “[m]uch of it was an unwieldy, bewildering and useless clutter; some of it was fruitful and revealing.” Id. Lieber did not stop gathering data after the publication of the POLITICAL ETHICS or the LIEBER CODE. In the summer of 1863, for example, he requested information on the Union Army’s response to the Confederate use of land mines, then a new weapon, during the Peninsular Campaign of 1862. See letter from General William F. Barry to General G.W. Cullom (Aug. 25, 1863), reprinted in RICHARD SHELLY HARTIGAN, LIEBER’S CODE AND THE LAW OF WAR, 130-31 (Precedent 1983).
113. Id.
114. Id.
pursuits, divesting themselves of the character or appearance of soldiers.115

Such men “if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates.”116

The criteria for these two extremes are relatively clear – regular, uniformed army units who fight behind enemy lines are lawful belligerents, while non-military persons who take up arms without authority, and claim the protection due civilians while they are not fighting, are unlawful guerrillas. Lieber posits a third case, however, where his guidance is less than limpid.

Armed prowlers, by whatever names they may be called, or persons of the enemy’s territory, 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.117

While most readers would probably assume that only civilians, or soldiers in civilian clothing, would be considered “armed prowlers,” one historian has recently noted that, taken literally, this definition could apply to an individual regular soldier, in uniform, captured behind enemy lines.118 (Arguably, a group of soldiers behind enemy lines would be considered legitimate partisans, under Lieber’s definition.) Lieber clarified that an individual armed soldier traveling in enemy territory as a messenger was not an armed prowler.119 One kind of soldier who goes “within the lines of the hostile army for the purpose of . . . killing” enemy military personnel is called a sniper. Under Lieber’s formulation, a Civil War era sniper might be punished as an armed prowler, even though a regular soldier in uniform.120 The passage on “armed prowlers” in Lieber’s earlier pamphlet Guerrilla Parties implied that this might well be the case, and that the matter was left within the captor’s discretion.121

Even an enemy in the uniform of the hostile army would stand little chance of protection if found prowling near the opposing army, separate

115. Id. at art. 82.
116. Id.
117. Id. at art. 84.
118. See Neff, supra note 83, at 80-81.
119. “A messenger carrying written dispatches or verbal messages from one portion of the army, or from a besieged place, to another portion of the same army, or its government, if armed, and in the uniform of his army, and if captured, while doing so, in the territory occupied by the enemy, is treated by the captor as a prisoner of war.” Lieber Code, art. 99.
120. Id. at art. 84.
from his own troops . . . and under generally suspicious circumstances. The chances would, of course, be far less if the prowler is in the common [civilian] dress worn by the countryman of the district. 122

Lieber speculated, perhaps on the basis of his own experiences in the Napoleonic Wars, that “the importance of writing on this subject is much diminished by the fact that the soldier generally decides these cases for himself” and will “execute on the spot an armed and murderous prowler found where he could have no business as a peaceful citizen.” 123 Lieber seems to have been unable to find sufficient empirical evidence as to whether regular soldiers, acting as snipers, were generally treated as prisoners of war or punished as armed prowlers, so he left the rule vague and equivocal. This approach may have been rigorously consistent with the positivist and scientific spirit of his times, but in this case it provided little helpful guidance to army officers in the field. 124

C. The Rise of Multilateral Law-Making Treaties

The second reason the Lieber Code became so influential was that it was issued at a pivotal moment in the development of international law. 125 Until the mid-nineteenth century, the laws and usages of war developed chiefly as customary law, through the gradual process of accumulated state practice. 126 Beginning in the 1850s, however, European powers began to alter or codify customary law through multilateral treaties binding on several states. 127 This new approach to making international law was initiated by three major conferences between 1856 and 1868, each of which focused on specific aspects of the laws and usages of war. 128

122. Id. 123. Id. At least one historian believes Union soldiers handled bushwhackers the same way during the Civil War. “Many guerrillas were reported killed in action or trying to escape. Explicit mention of [summary] execution in official correspondence was rare, and the details were usually ambiguous. ... As the guerrilla problem continued to fester, blatant references to executions became more common in official reports. They eventually became so routine that the killing of captured guerrillas required little to no justification in dispatches.” Mountcastle, supra note 68, at 40.

124. Today snipers operating in uniform are considered to be engaged in legitimate combat, and are entitled to prisoner of war status if captured. See, e.g., Yoram Dinstein, The Conduct of Hostilities Under the Law of International Armed Conflict 94-95, 199 (Cambridge University Press 2004).

125. Meron, supra note 92, at 139.

126. Briefly, supra note 100, at 96.

127. Briefly, supra note 100, at 96-97.

The 1856 Paris Conference was initially convened to negotiate an end to the Crimean War (1853-56) between the Russian Empire and the allied forces of the Ottoman Empire, Great Britain, France and Sardinia. During that war, the British and French, allies for the first time after 500 years of enmity, informally agreed to some common policies on how the Crimean War would be conducted at sea. The United Kingdom was the predominant naval power of the eighteenth and nineteenth centuries, and to partially redress this imbalance in naval power, France had historically relied on “privateers,” privately-owned warships licensed by the government to capture enemy merchant ships. Meanwhile, Great Britain had traditionally maintained the right to seize, as a “prize of war,” all cargo on enemy merchant ships, even if a citizen of a neutral state owned it. Great Britain had also asserted the right to seize as prize cargoes owned by enemy citizens, even if merchant ships flying the flag of a neutral country were carrying the cargoes. As allies during the Crimean War, France and Britain agreed, as a matter of policy, to suspend both of their traditional positions.

After peace negotiations concluded, France and Great Britain proposed to the other participants in the Paris Conference that a multilateral treaty be executed making permanent the policies that they had adopted during the war, and also settling a few other issues concerning the law of war at sea. This agreement, known as the Declaration of Paris, prohibited privateering, provided that neither enemy-owned cargo on a neutral merchant ship, nor neutral-owned cargo on an enemy merchant ship, would be subject to seizure, and required that blockades be “effective” (e.g., enforced by a sufficient number of warships to prevent actual access to the coast of the enemy). Originally signed by Austria,
France, the Ottoman Empire, Prussia, Russia, Sardinia and the United Kingdom, 55 countries eventually became parties to the Declaration.137

The second major conference on the law of war was convened by the Swiss government in 1864 to draft the initial Geneva Convention.138 The 1864 Convention established that military surgeons, other medical personnel, and military hospitals would be considered neutral in wartime.139 It also established a red cross on a white background as the international emblem of military medical activities.140 Fifty-seven countries, including the United States, eventually became parties to the Geneva Convention.141

A third major conference on the laws of war was convened in 1868 by Czar Alexander II in St. Petersburg, Russia to consider an international ban on the use of a specific type of rifle ammunition.142 In 1863, the Russian army developed a rifle bullet that exploded upon impact with a hard surface, to be used by sharpshooters to blow up enemy ammunition wagons.143 By 1867, however, the bullet design had been “improved” to explode on impact with a soft surface, such as human flesh.144 Czar Alexander’s government concluded that this was an inhumane weapon,
reasoning that a soldier wounded by an ordinary rifle round would in all likelihood be put out of action by the wound alone. An exploding bullet would only make the wound harder to treat, thus causing unnecessary suffering or even needless death for a soldier who would have been removed from battle anyway.

To ensure that if the Russians banned the use of such bullets, their potential enemies would not use them either, the Czar convened the St. Petersburg Conference to negotiate a multilateral ban on small caliber exploding bullets. At the end of 1868, the St. Petersburg Conference approved a legally binding Declaration banning the use in war of explosive or incendiary rifle bullets weighing less than 400 grams. Twenty countries thereafter became parties to the St. Petersburg Declaration, including some of Russia’s potential enemies such as Prussia, Austria, and the Ottoman Empire.

Other political factors may have influenced the Czar’s decision as well. During the Crimean War of 1853-56, the British and French had accused Russian soldiers of committing widespread atrocities (e.g., mutilating the dead and killing wounded soldiers). These accusations reinforced a common belief in Western Europe that Russia was an “uncivilized” country, more Asian than European in culture. During the Crimean War, an English member of Parliament published a pamphlet asserting that “Russia is a country which makes no advances in any intellectual or industrial pursuits,” and that “Russia seeks to obtain excellence only in the arts of war – for that there is no sum she will not pay.” What better way to refute such accusations than to lead an international movement to ban, as inhumane, a weapon the Russian army itself had developed? Familiar

145. Id.
146. Id.
147. Id.
148. Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Nov. 29/Dec.11, 1868, reprinted in The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents (Dietrich Schindler and Jiri Toman, eds., Sijthoff & Noordhoff 1981); The Law of War: A Documentary History 95 (Leon Friedman ed., Greenwood Pub Group 1972). The United States did not take part in the St. Petersburg Conference or become a party to the Declaration. A few types of exploding bullets had been used in the Civil War. However, in 1868 the U.S. Army adopted a policy, based on humanitarian considerations, against using explosive bullets in the future. See Robert V. Bruce, Lincoln and the Tools of War 190-92, 257, 282 (Bobbs-Merrill1956).
150. See Figes, supra note 129 at 221-22; 270-72 (2011).
151. Figes, supra note 129, at 270-71.
152. Figes, supra note 129, at 328.
with the precedents of Geneva and Paris, Czar Alexander, a reformer who had abolished Russian serfdom in 1861, may have regarded the St. Petersburg Conference as a way to restore Russia’s reputation as a civilized nation.

While these three treaties dealt with specific issues arising under the law of war, the publication of the Lieber Code demonstrated that it might be possible to negotiate a multilateral treaty to codify and reform all of the rules of land warfare. The Franco-Prussian War of 1870-71 led to renewed interest in clarifying the laws and usages of war, and in 1874 Czar Alexander II followed up his diplomatic success at St. Petersburg by convening a conference of fifteen powers in Brussels, Belgium, to codify the laws of land warfare. The draft treaty submitted to the conference (later known as the Brussels Declaration) was prepared by the Swiss jurist Johann Bluntschli, a friend of Francis Lieber who based his draft directly on the Lieber Code, with a few additions to reflect developments since 1863.

While the Brussels Declaration never entered into force as a treaty, it influenced the next effort to codify the laws of war at a meeting of international legal scholars at Oxford, England in 1880. That meeting unanimously approved a manual on the law of land warfare, commonly known as the Oxford Manual.

A legally binding, multilateral treaty to codify the laws of land warfare was not finally concluded until the Peace Conference held at The Hague, Netherlands in 1899. Though convened in the Netherlands, this conference was, following the precedents established by Czar Alexander II, held under the sponsorship of his grandson, Czar Nicholas II. The 1899 Conference adopted a Convention with an annexed set of Regulations based on the Brussels Declaration, the Oxford Manual and,

153. See Meron, supra note 92, at 138-40.
154. Project of an International Declaration Concerning the Laws and Customs of War, Aug. 27, 1874, reprinted in The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents (Dietrich Schindler and Jiri Toman, eds., Sijthoff & Noordhoff 1981); The Law of War: A Documentary History 25, 27 (Leon Friedman ed., Greenwood Pub Group 1972). See Meron, supra note 92, at 139; Nussbaum, supra note 103, at 227. Bruntschli, a professor at the University of Heidelberg, was probably chosen by the Russians to prepare the draft because in 1866 he had published, in German, a treatise on the modern law of war (which was also based largely on the Lieber Code). See http://universalium.academic.ru/259886/Bluntschli_Johann_Kaspar (last visited Aug. 5, 2011).
155. Meron, supra note 92, at 139.
157. Meron, supra note 92, at 139-40.
158. Id.
ultimately, on the Lieber Code. The Regulations received relatively minor revisions at a second Hague Peace Conference in 1907. In the twentieth century the Hague Regulations were supplemented by new treaties that reflected the experiences of the two World Wars and several postwar conflicts, including Vietnam. The continuing influence of the Lieber Code, and the progressive development of its principles, can be traced through the evolution of some of Lieber’s rules over the last century and a half.

IV. THE INFLUENCE OF THE LIEBER CODE

A. The Levée en Masse

In 1793, when neighboring monarchies threatened to invade France and overthrow the Republic, the French Committee of Public Safety issued a decree calling upon all men of military age, whether enrolled in the army or not, to take up arms to resist the invaders, while other members of society supported the war effort. From this moment until that in which the enemy shall have been driven from the soil of the Republic, all Frenchmen are in permanent requisition for the service of the armies. The young men shall go to battle; the married men shall forge arms and transport provisions; the women shall make tents and clothing and shall serve in the hospitals; the children shall turn old linen into lint; the aged shall betake themselves to the public places in order to arouse the courage of the warriors and preach the hatred of kings and the unity of the Republic.

In the 1860s, the legitimacy of this practice, known by the French term levée en masse, was still controversial. Lieber, however, believed that he had sufficient evidence of state practice to justify the conclusion that civilian participants in a levée en masse were legitimate combatants and entitled to protection as prisoners of war, and he included this conclusion in his Code.

159. Convention (II) with Respect to the Laws and Customs of War on Land, July 29 1899, 32 Stat. 1803; T.S. 403 (hereinafter 1899 Hague Regulations). The 1899 and 1907 Hague Peace Conferences were the first such conferences attended by the United States.

160. Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18 1907, 36 Stat. 2277; T.S. 539 (hereinafter 1907 Hague Regulations). The 1907 Conference was also sponsored by Czar Nicholas II.


162. Id.

163. Id.

164. Lieber Code, art. 51.
If the people of that portion of an invaded country which is not yet occupied by the enemy, or of the whole country, at the approach of a hostile army, rise, under a duly authorized levée en masse to resist the invader, they are now treated as public enemies, and, if captured, are prisoners of war.\textsuperscript{165}

The 1874 Brussels Declaration followed Lieber in declaring the levée en masse to be a legitimate practice, but added the requirement that the participants must themselves follow the “laws and customs of war,” an addition in which Lieber probably would have concurred.\textsuperscript{166} The 1880 Oxford Manual reached the same result by including levée en masse participants in its definition of a nation’s armed forces.\textsuperscript{167} Lieber’s conclusion first became treaty law in the 1899 Hague Regulations on land warfare, which declared participants in a levée en masse to be legitimate belligerents.\textsuperscript{168} The 1907 Hague Regulations retained this provision, while adding the requirement that participants “carry arms openly.”\textsuperscript{169}

Even by 1907, however, the levée en masse was still controversial for some major nations.\textsuperscript{170} In the first half of the twentieth century, Germany and Japan still refused to recognize participants in a levée en masse as legitimate belligerents.\textsuperscript{171} The matter was not settled until those countries became parties to the 1949 Geneva Convention on Prisoners of War,

\footnotesize
\textsuperscript{165.} Id.
\textsuperscript{166.} “The population of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves . . . shall be regarded as belligerents if they respect the laws and customs of war.” Project of an International Declaration Concerning the Laws and Customs of War, Aug. 27, 1874, art. 10, reprinted in \textsc{The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents} 29 (Dietrich Schindler and Jiri Toman, eds., Sijthoff & Noordhoff 1981).

\textsuperscript{167.} “The armed force of a State includes … [t]he inhabitants of non-occupied territory, who, on the approach of the enemy, take up arms spontaneously and openly to resist the invading troops, even if they have not had time to organize themselves.” The Laws of War on Land, Sept. 9, 1880, art. 2, reprinted in \textsc{The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents} 29 (Dietrich Schindler and Jiri Toman, eds., Sijthoff & Noordhoff 1981). Art. 3 of the Oxford manual required all armed forces “to conform to the laws of war.”

\textsuperscript{168.} “The population of a territory which has not been occupied who, on the enemy’s approach, spontaneously take up arms to resist the invading troops without having time to organize themselves . . . shall be regarded as belligerent, if they respect the laws and customs of war.” 1899 Hague Regulations, art. 2.

\textsuperscript{169.} “The inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves . . . shall be regarded as belligerents if they carry arms openly and if they respect the laws and customs of war.” 1907 Hague Regulations, art. 2. Note that in 1880 the Oxford Manual had called upon participants in a levée en masse to take up arms “openly.”

\textsuperscript{170.} See Stone, \textit{supra} note 142, at 540-50.

\textsuperscript{171.} Stone, \textit{supra} note 142, at 550.
which explicitly declared participants in a levée en masse to be entitled to treatment as prisoners of war.\footnote{172}

**B. The Influence of the Lieber Code: Guerrillas and “War Rebels”**

While Francis Lieber was successful in establishing that armed civilians could legitimately resist an invading army through the levée en masse, he regarded civilian resistance very differently once an area had been occupied by an enemy army. Civilians who engaged in armed resistance to an occupying power could, he implied, be punished as brigands or bandits.\footnote{173}

> No belligerent has the right to declare that he will treat every captured man in arms of a levée en masse as a brigand or bandit. If, however, the people of a country, or any portion of the same, already occupied by an army, rise against it, they are violators of the laws of war, and are not entitled to their protection.\footnote{174}

Lieber even coined a new term – “war rebels” – for those resisting an occupying army.\footnote{175}

> War-rebels are persons within an occupied territory who rise in arms against the occupying or conquering army, or against the authorities established by the same. If captured, they may suffer death, whether they rise singly, in small or large bands, and whether called upon to do so by their own, but expelled, government or not. They are not prisoners of war; nor are they if discovered and secured before their conspiracy has matured to an actual rising or armed violence.\footnote{176}

These provisions of the Lieber Code accurately state the customary law of war at the time (though the term “war rebel” never came into general use). However, in the century and a half since the Lieber Code was written,
politicians, scholars and diplomats have repeatedly clashed over efforts to 
accord prisoner of war status or some other form of legitimacy to civilians 
engaged in armed resistance to an occupying army. In general, 
militarily powerful states, more likely to become occupying powers than to 
be occupied, have favored keeping resistance movements unlawful, while 
smaller countries, more likely to be subject to occupation, have pushed to 
legitimize armed resistance. Since World War II, the developing 
countries have joined the debate, seeking to legitimize the violent 
“national liberation movements” that often preceded the granting of 
independence to former colonies.

The issue was first seriously considered following the Franco-Prussian 
War. The regular French army was soundly and humiliatingly defeated 
early in the war, and part of France was occupied by the Prussian army and 
their German allies. During the occupation, local civilians, known at 
the time as *francs-tireurs*, harassed the German army with sniping, 
ambushes and sabotage. The Germans invariably executed captured 
*francs-tireurs* as unlawful guerrillas. Eventually, they executed any 
armed Frenchman who could not produce written proof that he was 
authorized by the French government to engage in hostilities.

However, many Frenchmen and foreign observers regarded the *francs-
tireurs* as heroes, redeeming the national honor the army had lost. After 
being embraced by the French government, the *francs-tireurs* movement 
grew and took in all parts of the French political spectrum. It attracted 
foreign volunteers from America, England, Ireland, Italy, Poland, and 
Spain. The Italians were led by the famous nationalist Giuseppe 
Garibaldi. The execution of *francs-tireurs* and savage reprisals by the 
German army may have helped secure that army’s lines of supply, but 
Germany was clearly losing the war for European and American public 
opinion.

177. See Michael Bothe, Karl Josef Partsch and Waldemar A. Solf, New Rules for 
Victims of Armed Conflicts 244-46 (Martinus Nijhoff Publishers 1982).
178. Id.
179. See id. at 245-52.
180. Farwell, supra note 5, at 323.
182. Farwell, supra note 5, at 324.
183. See Howard Levie, Prisoners of War in International Armed Conflict 44 (Naval 
War College Press 1978); Farwell, supra note 5, at 324.
184. See Howard, supra note 181, at 251-52.
185. Id.
186. Id.
187. Id. at 253.
188. Id. at 252-254.
As a result of international controversy over the treatment of francs-tireurs, a compromise was proposed at the 1874 Brussels conference.\footnote{189. Project of an International Declaration Concerning the Laws and Customs of War, Aug. 27, 1874, \emph{reprinted in} \textsc{The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents} (Dietrich Schindler and Jiri Toman, eds., Sijthoff & Noordhoff 1981).} Legitimate belligerent status was to be granted not only to armies, “but also to militia and volunteer corps” fulfilling the following conditions:

1. That they be commanded by a person responsible for his subordinates;
2. That they have a fixed distinctive emblem recognizable at a distance;
3. That they carry arms openly; and
4. That they conduct their operations in accordance with the laws and customs of war.\footnote{190. Project of an International Declaration Concerning the Laws and Customs of War, Aug. 27, 1874, art. 9, \emph{reprinted in} \textsc{The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents} 27 (Dietrich Schindler and Jiri Toman, eds., Sijthoff & Noordhoff 1981).}

This formulation was eventually included in the 1899 and 1907 Hague Regulations and in the 1949 Geneva Convention on Prisoners of War.\footnote{191. \textit{See} Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 4(A)(6), 6 U.S.T. 3316; \textsc{T.L.A.S.} 3364; 75 U.N.T.S. 135, art. 4(A)(2); 1907 Hague Regulations, art. 1; 1899 Hague Regulations, art. 1.} Treatment of resistance movements in occupied territory had become an especially sensitive issue in World War II, so the 1949 Convention includes explicit language to ensure that these criteria apply in occupied territory.\footnote{192. \textit{Id.} at art. 4.} Among the categories of persons entitled to be treated as prisoners of war are “[m]embers of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements,” fulfill the four requirements first set out in 1874.\footnote{193. \textit{Id.}}

One authority has referred to the rules on militia, volunteer corps, and resistance movements in Article 4 of the 1949 Geneva Convention on Prisoners of War as the “most complicated, most controversial and most unintelligible provision of the Article.”\footnote{194. \textit{Levie, supra} note 183, at 38.} As a practical matter, this provision has not actually helped resistance movements gain legitimacy in the eyes of any occupying power. How, for example, is a captured resistance fighter to establish that he or she is “commanded by a person...
responsible for his subordinates?"195 Resistance and liberation movements by their nature are clandestine organizations, and revealing the names of superiors, assuming they are not using false names to begin with, would be a betrayal of the organization. Complying with the “laws and customs of war” is also usually impractical, as these movements typically do not have the resources necessary to take significant numbers of prisoners of war or to treat them humanely. Finally, there is no consensus among authorities on what constitutes “a fixed distinctive emblem recognizable at a distance.”196 For most resistance movements, the Lieber Code’s harsh rules have proven to still be in effect despite the Hague Regulations and the 1949 Geneva Convention on Prisoners of War.197

The international community again tried to clarify the status of resistance and national liberation movements at a diplomatic conference in Geneva from 1974 to 1977, where two Additional Protocols to the 1949 Geneva Conventions were negotiated.198 The First Additional Protocol, which applies to international armed conflicts and some wars of national liberation, eliminated the four criteria and instead adopted a broad definition of armed forces to include “all organized armed forces, groups and units which are under a command responsible . . . for the conduct of its subordinates.”199 The First Additional Protocol further states that an armed force must “be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.”200 Members of armed forces “are combatants, that is to say, they have the right to participate directly in hostilities” and to be treated as prisoners of war if captured.201 “In order to promote the protection of the civilian population from the effects of

196. See Levie, supra note 183, at 46-49.
197. As a matter of policy a government can, of course, accord prisoner of war status to guerrillas who do not meet the four criteria in the Geneva Convention. During the war in Vietnam, for example, the United States and its ally, the Republic of Vietnam, granted prisoner of war status to Viet Cong guerrillas whenever they were captured bearing weapons openly in battle, even though they did not meet all four criteria. See Arthur W. Rovine, Digest of United States Practice in International Law 1973 at 501 (U.S. Dep’t of State Pub. 8756, 1974).
198. For general background on the conference and the Protocols: See Meron, supra note 92, at 175-86; John A. Boyd, Digest of United States Practice in International Law 1977 at 917-19 (U.S. Dep’t of State Pub. 8960, 1979). For an in depth analysis of the two Protocols, see Bothe, Partsch and Solf, supra note 177.
200. Id. at art. 43.
201. Id. at arts. 43-44.
hostilities,” the Protocol declares that members of the armed forces “are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack.”

When a member of a resistance movement is engaged in guerrilla warfare against an occupying power, that obligation can be met merely by carrying arms openly “during each military engagement, and . . . during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.” No resistance or liberation movement has yet claimed lawful combatant status under the Protocol, so it remains to be seen whether these provisions will, in practice, be more effective than the four criteria introduced in the 1874 Brussels Declaration.

C. A Serious Omission: Reprisals and Hostages in Occupied Territory

While the Lieber Code made it clear that “war rebels” engaged in armed resistance to an occupying power could be punished when captured, it gave very little guidance on what other means an occupying army could use to suppress armed civilian resistance. In practice, occupying armies in the nineteenth century, including the U.S. Army, imposed collective punishments on civilian populations located at or near areas of guerrilla activity. For example, while in command of British occupation forces in France at the end of the Napoleonic Wars, the Duke of Wellington threatened to destroy villages and execute civilian hostages in response to French guerrilla activity. In response to guerrilla ambushes during the war between the United States and Mexico, General Winfield Scott imposed on the mayor of the Mexican village nearest the ambush site a fine of $300 for every U.S. soldier killed. During the Franco-Prussian War, German forces took harsh reprisals against French towns and villages in response to activities of the frans-tireurs.

Union commanders in the Civil War often adopted similar measures in response to Confederate guerrilla activity. Collective fines on local civilians were one common response. For example, when guerrillas in

202. Id.
203. Id.
204. Lieber Code art. 85.
207. See Howard, supra note 181, at 250-51.
208. See Mountcastle, supra note 68, at 57-59.
Tennessee executed three captured Union soldiers, the local Union commander imposed a collective fine of $30,000 on the “rebel citizens” living within 30 miles of the place the soldiers were captured.\textsuperscript{209} When a guerrilla sniper killed a passenger on a steamboat near Rocheport, Missouri, a fine of $10,000 was imposed on the people of the town.\textsuperscript{210}

Retaliation could go beyond monetary assessment to include taking of hostages, burning buildings and even the execution of prisoners.\textsuperscript{211} In 1862, for example, in response to guerrilla attacks on Union pickets in Missouri, General Grant ordered every civilian within six miles of the incident to be arrested and held as hostages.\textsuperscript{212} Almost one hundred people were taken into Union custody as a result.\textsuperscript{213} At another location in Missouri later that year, ten prisoners were executed in retaliation for the killing of a pro-Union civilian by guerrillas.\textsuperscript{214} According to one authority, in 1862 “retributive burning” became the cornerstone of Union policy on guerrilla attacks against ships on the Mississippi River.\textsuperscript{215} On September 23, for example, a Union supply ship was fired on by guerrillas near the small town of Randolph, Tennessee.\textsuperscript{216} In retaliation, General Sherman ordered a Union regiment to systematically burn the entire town. Three days later he reported to General Grant that the order had been carried out.\textsuperscript{217}

One of the most serious defects of the Lieber Code is its failure to offer more than the most general guidance on these and similar responses to guerrilla warfare. Lieber did note that retaliation was sometimes justified.\textsuperscript{218}

The law of war can no more wholly dispense with retaliation than can the law of nations, of which it is a branch. Yet civilized nations acknowledge retaliation as the sternest feature of war. A reckless enemy often leaves to his opponent no other means of securing himself against the repetition of barbarous outrage.\textsuperscript{219}

\textsuperscript{210} See Goodrich, \textit{supra} note 68, at 128.
\textsuperscript{211} See Mountcastle, \textit{supra} note 68, at 32.
\textsuperscript{212} Mountcastle, \textit{supra} note 68, at 32.
\textsuperscript{213} Mountcastle, \textit{supra} note 68, at 32.
\textsuperscript{214} See \textsc{Mark Neely}, \textsc{The Civil War and the Limits of Destruction} 42-49 (Harvard University Press 2007).
\textsuperscript{215} See Mountcastle, \textit{supra} note 68, at 59, 74-75.
\textsuperscript{216} \textit{Id.}
\textsuperscript{217} \textit{Id.}
\textsuperscript{218} Lieber Code, art. 27.
\textsuperscript{219} \textit{Id.}
Lieber cautioned against “[u]njust or inconsiderate retaliation” and advised it should be resorted to “only as a means of protective retribution, and moreover, cautiously and unavoidably; that is to say, retaliation shall only be resorted to after careful inquiry into the real occurrence, and the character of the misdeeds that may demand retribution.”220 He noted that prisoners of war might be proper object of retaliation,221 but said nothing about retaliation against civilians, or whether there were any limits on such retaliation.

Was $10,000 per victim an appropriate fine for killing Union soldiers by guerrillas, or should a commander start with a lower assessment, as General Scott had in Mexico?222 Should a commander try assessing collective fines before resorting to destruction of civilian property or the execution of prisoners? Was executing ten prisoners for the killing of a single soldier disproportionate to the offense? Field officers would look in vain for answers to such questions in the Lieber Code.222

Perhaps, as was the case in defining “armed prowlers,” Lieber simply could not find sufficient evidence of consistent international practice to lay down specific rules for legitimate retaliation. Most of the recent historical examples of retaliation against civilians had been carried out by the French army under Napoleon I. Lieber would have regarded the Emperor’s actions with suspicion in light of Napoleon’s notorious lack of respect for the law. Resort to “natural law” did not give guidance that was much better, beyond the admonishment that retaliation should not be carried out for revenge or out of cruelty.

In addition, Lieber’s advice on hostages was not only unhelpful, it was anachronistic and confusing.

A hostage is a person accepted as a pledge for the fulfillment of an agreement concluded between belligerents during the war, or in consequence of a war. Hostages are rare in the present age. If a hostage is accepted, he is treated like a prisoner of war, according to rank and condition, as circumstances may admit.223

By limiting his treatment of hostages to the original, but obsolete, meaning of the term (a person handed over to a hostile party as security for performance of an agreement), Lieber stepped out of his role as an

220. Id. at art. 28.
221. “All prisoners of war are liable to the infliction of retaliatory measures.” Id. art. 59. “Reprisal” is the modern term for what Lieber called “retaliation.” See generally Frits Kalshoven, Belligerent Reprisals (Leyden 1971). Reprisals against prisoners of war were first prohibited after World War I by the Convention Relative to the Treatment of Prisoners of War, July 27, 1929, art. 2, 47 Stat. 2021, 118 L.N.T.S. 343. This prohibition was retained in the Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 13, 6 U.S.T. 3316; T.I.A.S. 3364; 75 U.N.T.S. 135.
222. See Mountcastle, supra note 68, at 64-68.
223. Lieber Code, arts. 54-55.
empirical researcher on the law of war and instead reverted to being an amateur German philologist.

The first express limitation on collective punishment appeared in the 1899 Hague Regulations.224 “No general penalty, pecuniary or otherwise, can be inflicted on the population on account of the acts of individuals for which it cannot be regarded as collectively responsible.”225 This rule had little practical impact because military commanders imposing collective punishments invariably believed that the target population was collectively responsible for the earlier wrong.226 Collective punishments remained common in occupied territories in both World Wars.227 Collective punishment of, and retaliation against, the inhabitants of occupied territory was not definitively prohibited until the conclusion of the 1949 Geneva Convention on Civilians.228 The 1949 Convention also prohibited the taking of hostages in occupied territory.229

D. The Influence of the Lieber Code: Slavery and Race

At one other point in drafting his Code, Francis Lieber partially discarded his role as an empirical researcher into state practice, only this time he turned for inspiration to the natural law theory of international law rather than to philology. In late 1862, in response to the Emancipation Proclamation declaring that slaves held in the Confederacy would be regarded by the United States as free men and women, Jefferson Davis issued his own proclamation.230 Davis charged that Lincoln’s Proclamation was an incitement to race war, and threatened to deny prisoner of war status to captured African American soldiers and their officers.231 By early 1863, there were disturbing reports that African American soldiers, and other African Americans associated with the Union army, were being sold into slavery or otherwise mistreated by Confederate authorities.232

In response to these developments, Francis Lieber included in his Code an extensive attack on racial discrimination and slavery as contrary to

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224. 1899 Hague Regulations, art. 50. The prohibition was carried over into the 1907 Hague Regulations, art. 50.
225. 1899 Hague Regulations, art. 50.
226. Compare Stone, supra note 142, at 703, with Kalshoven, supra note 221, at 200-202.
227. Stone, supra note 142, at 703.
229. Id.
231. See id.
natural law as well as European state practice. Even soldiers who had been slaves in the South, he argued, should be treated as prisoners of war if captured by the Confederates.

Slavery, complicating and confounding the ideas of property, (that is of a thing,) and of personality, (that is of humanity,) exists according to municipal or local law only. The law of nature and nations has never acknowledged it. The digest of the Roman law enacts the early dictum of the pagan jurist, that “so far as the law of nature is concerned, all men are equal.” Fugitives escaping from a country in which they were slaves, villains, or serfs, into another country, have, for centuries past, been held free and acknowledged free by judicial decisions of European countries, even though the municipal law of the country in which the slave had taken refuge acknowledged slavery within its own dominions.

Therefore, in a war between the United States and a belligerent which admits of slavery, if a person held in bondage by that belligerent be captured by or come as a fugitive under the protection of the military forces of the United States, such person is immediately entitled to the rights and privileges of a freeman. To return such person into slavery would amount to enslaving a free person, and neither the United States nor any officer under their authority can enslave any human being. Moreover, a person so made free by the law of war is under the shield of the law of nations, and the former owner or State can have, by the law of postliminy, no belligerent lien or claim of service.

The law of nations knows of no distinction of color, and if an enemy of the United States should enslave and sell any captured persons of their army, it would be a case for the severest retaliation, if not redressed upon complaint.

233. Lieber Code, art. 42.
234. Id.
235. Id. “Wars arose, and in their train followed captivity and then slavery, which is contrary to the law of nature; for by that law all men are originally born free.” The Institutes of Justinian 1.2.2 (Thomas Collett Sanders trans., Greenwood Press 1970).
236. Lieber Code, art. 43. “Postliminy” was a doctrine of ancient Roman law that held that a Roman lost his status as a free citizen when captured in war. However, if the captive was able to return to Roman territory, his former rights were reinstated. See The Institutes of Justinian, supra note 235, at 1.12.5. See also John Crook, Law and Life of Rome 62 (Cornell University Press 1967); Barry Nicholas, An Introduction to Roman Law 71 n.2 (Oxford: Clarendon Press 1962). Similarly, if a Roman slave was able to escape to his original country, he became free. See. The Institutes of Justinian, supra note 235, at 2.1.17. Roman law was long considered to be an expression of natural law. See Brierly supra note 100, at 19-20.
237. Lieber Code, art. 58. “Lieber stated that the law of nations admits no distinctions based on color. The continuing importance of this prohibition, designed to protect black soldiers of the Union army who might fall into the hands of the Confederate army, … became apparent in World War II, when the Nazis denied the privileges granted to prisoners of war to Jews in the Polish and Soviet armies and to blacks in the French army.” Meron, supra note 92, at 137. Racial
By arguing that racial discrimination was incompatible with international law, Lieber anticipated, and may have inspired, one of the principal tenets of international human rights law as it developed in the last half of the twentieth century. Of more immediate importance in his own time, he provided a legal foundation for the U.S. Army to enforce the civil rights of former slaves in occupied areas of the Confederacy.

**E. The Influence of the Lieber Code: Bombardment, Sieges and Starvation**

Lieber found the right of armed civilians to resist an invader to be very different from their right to rise up against an occupying power. Similarly, he found the proper treatment of civilians in a town or city under attack, but not besieged, to be very different from their treatment during a siege. If a defended town was to be bombarded by artillery, then Lieber advised that the attacking commander should, “whenever admissible, inform the enemy of their intention to bombard a place, so that the noncombatants, and especially the women and children, may be removed before the bombardment commences.” However, he also cautioned that “it is no infraction of the common law of war to omit thus to inform the enemy” because surprise might be “a necessity.”


239. Lieber Code, art. 19.

240. Id.

241. Id.

242. Id. Union army practices varied during the Civil War. Warning was given prior to the bombardment of Fredericksburg, Virginia, in 1862 and Charleston, South Carolina, in 1863, but General Sherman did not issue a warning before commencing bombardment of Atlanta, Georgia, in 1864. See, e.g., Neff, supra note 83, at 89; GEORGE C. RABLE, FREDERICKSBURG! FREDERICKSBURG! FREDERICKSBURG! 83-85 (THE UNIVERSITY OF NORTH CAROLINA PRESS 2002); BROOKS SIMPSON and JEAN BERLIN, SHERMAN’S CIVIL WAR: SELECTED CORRESPONDENCE OF WILLIAM T. SHERMAN, 1860-1865, 710-11 (The University of North Carolina Press 1999); E. MILBY BURTON, THE SIEGE OF CHARLESTON, 1861-1865 251-52 (University of South Carolina Press 1970). No warning was given before the initial bombardment of Petersburg, Virginia in 1864; see NOAH ANDRE TRUDEAU, THE LAST CITADEL: PETERSBURG, VIRGINIA JUNE 1864-APRIL 1865, at 91-92 (Louisiana State University Press 1993). General Grant did not issue a warning before his initial bombardment of Vicksburg, Mississippi, on May 19, 1863, but this was in support of an immediate infantry assault. Surprise was necessary because Grant hoped to take the town quickly while the Confederate forces were still disorganized from their retreat from the battle of Champion Hill. See Eicher, supra note 5, at 467-68. Support of an infantry assault became a recognized exception to the warning requirement as the rule was developed later in the nineteenth century. See Project of an International Declaration Concerning the Laws and Customs of War, Aug. 27, 1874, art. 16, reprinted in THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 27 (Dietrich Schindler and Jiri Toman, eds., Stijhoff & Noordhoff 1981); The Laws of War on Land, Sept. 9, 1880, art. 33, reprinted in THE LAWS OF ARMED CONFLICTS: A COLLECTION OF
However, once a besieged town was surrounded, its civilians might lose the right to leave.243 “When a commander of a besieged place expels the noncombatants, in order to lessen the number of those who consume his stock of provisions, it is lawful, though an extreme measure, to drive them back, so as to hasten on the surrender.”244 To remove any doubt about the implications of this rule, the Lieber Code noted that it was “lawful to starve the hostile belligerent, armed or unarmed, so that it leads to the speedier subjection of the enemy.”245

Lieber’s advice on warning before bombardments was developed and clarified over the next century. The harsh rules on starvation that he articulated were, however, not substantially changed until the 1970s, sad evidence that they did in fact reflect the military practice of many governments.246

The 1874 Brussels Declaration added a provision, perhaps implicit in the Lieber Code, providing that only defended towns and places could be bombarded or besieged.247 Towns or cities open to immediate enemy occupation without resistance should not be bombarded.248 The Brussels Declaration then reformulated Lieber’s rule on warning as follows: “. . . if a town or fortress, agglomeration of dwellings, or village, is defended, the officer in command of an attacking force must, before commencing a bombardment, except in assault, do all in his power to warn the authorities.”249 The statement that failure to do this was not a violation of the law was omitted.250 Since the Declaration was initially intended to

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243. Lieber Code, art. 18.
244. Id.
245. Id. at art. 17.
246. The statement that civilians may be driven back into a besieged town remained in the U.S. Army manual on the law of war as recently as 1956. “It is within the discretion of the besieging commander whether he will permit noncombatants to leave and under what conditions. Thus, if a commander of a besieged place expels the noncombatants in order to lessen the logistical burden he has to bear, it is lawful, though an extreme measure, to drive them back, so as to hasten the surrender. Persons who attempt to leave or enter a besieged place without obtaining the necessary permission are liable to be fired upon, sent back, or detained.” U.S. DEP’T OF THE ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para. 44a (1956).
248. Id.
249. Id. at art. 16.
250. Id.
become a treaty, this would have converted Lieber’s advice into a binding obligation.

The 1880 Oxford Manual repeated the prohibition on bombarding undefended places, and restated the warning requirement in yet another form.251 “The commander of an attacking force, save in cases of open assault, shall, before undertaking a bombardment, make every due effort to give notice thereof to the local authorities.”252

The warning requirement finally became a clear legal obligation in Articles 25 and 26 of the 1899 Hague Regulations.253

Art. 25. The attack or bombardment of towns, villages, habitations or buildings which are not defended, is prohibited.254

Art. 26. The commander of an attacking force, before commencing a bombardment, except in the case of an assault, should do all he can to warn the authorities.255

Articles 25 and 26 were repeated in the 1907 Hague Regulations, with one important change.256 Article 25 was revised to refer to “attack or bombardment, by whatever means of towns, villages,” etc.257 The new phrase was intended to ensure that air bombardments were covered by the Hague Regulations in addition to artillery bombardments.258 However, this change had some unintended consequences.

While Lieber’s original formulation had only referred to the need for “surprise” as justifying a failure to warn, all the latter reformulations of it narrowed the exception to cases of ground assault on a fortified town.259 The introduction of air warfare made these exceptions too narrow to be practical.260 Aerial bombing could occur far behind enemy lines, and specific warnings as to time and place of the attack would have alerted enemy air defenses.261 Some commentators dismissed such a literal reading of the Hague Regulations warning requirement.262 However, two
arbitral decisions arising out of World War I held Germany liable for civilian collateral damage resulting from zeppelin attacks on Allied forces occupying the Greek city of Thessaloniki, on the ground that the Germans had not provided the warnings required by Article 26 of the 1907 Hague Regulations.\textsuperscript{263} It is ironic that Lieber’s 1863 statement of the warning requirement was better adapted to the rise of air warfare in the twentieth century than the codification at the Hague Conference 44 years later. The issue was finally resolved by the 1977 First Additional Protocol to the Geneva Conventions, which adopted a broad rule, similar to Lieber’s original formula, requiring only that “effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.”\textsuperscript{264}

The Lieber Code’s stern guidance that it was “lawful to starve the hostile belligerent, armed or unarmed,” remained unaltered until the negotiation of the 1949 Geneva Convention on Civilians.\textsuperscript{265} The Convention did not flatly forbid starvation of civilians, but it contained two provisions intended to soften the impact of sieges and blockades on the civilian population.\textsuperscript{266}

The Parties to the conflict shall endeavor to conclude local agreements for the removal from besieged or encircled areas, of wounded, sick, infirm, and aged persons, children and maternity cases, and for the passage of ministers of all religions, medical personnel and medical equipment on their way to such areas.\textsuperscript{267}

Each High Contracting Party shall allow the free passage of all consignments of medical and hospital stores and objects necessary for religious worship intended only for civilians of another High Contracting Party, even if the latter is its adversary. It shall likewise permit the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases.\textsuperscript{268}

of which laid down the flexible rule that “[i]f the military situation permits, the commander of the attacking naval force, before commencing the bombardment, must do his utmost to warn the authorities.” Even in 1907, it should have been foreseen that this form of words was better suited to air warfare than art. 26 of 1899.

\textsuperscript{263} See Schwarzenberger, supra note 94, at 144-46.


\textsuperscript{266} Id.

\textsuperscript{267} Id. at art. 17.

\textsuperscript{268} Id. at art. 23.
While some authorities have hailed these provisions as important advances for international humanitarian law, others have emphasized their limited practical effect. Neither provision benefits the entire civilian population in areas under siege or blockade, but only specific classes of civilians, such as pregnant women. As a legal obligation, “endeavor[ing] to conclude” an agreement is extremely weak. The obligation to allow “free passage” of limited types of relief supplies is further weakened by a paragraph allowing a besieging or blockading commander to refuse passage of the supplies if there are “serious reasons for fearing” that “the consignments may be diverted from their destination” or that

a definite advantage may accrue to the military efforts or economy of the enemy through the substitution of the [relief] consignments for goods which would otherwise be provided or produced by the enemy or through the release of such material, services or facilities as would otherwise be required for the production of such goods.

With these loopholes in place, a commander who wishes to starve the civilian population of an area under siege or blockade should have little difficulty finding a colorable excuse to refuse passage of relief consignments.

The 1977 Additional Protocol formally reversed the Lieber Code’s conclusion that it was lawful to starve civilians during sieges. One new article flatly stated that “[s]tarvation of civilians as a method of warfare is prohibited,” while another prohibited direct attacks on civilians, implicitly prohibiting firing on civilians to drive them back into cities under siege. Other provisions obligate the parties to a conflict to “allow

269. Compare FRITS KALSHOVEN, CONSTRAINTS ON THE WAGING OF WAR 52 (International Committee of the Red Cross 1987) (“In view of the naval blockades of both World Wars, great importance attaches to the provision in Article 23” allowing free passage of relief consignments.), with JEAN PICTET, HUMANITARIAN LAW AND THE PROTECTION OF WAR VICTIMS 121 (Brill Archive 1975) (“While the conditions in Article 23 themselves seem to be legitimate, they leave such wide discretionary power to the blockading Powers that the provision thereby unquestionably loses much of its effect.”).


272. Id. at art 57.

273. “The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.” Id. art. 51. Although the United States has not become a party to this Protocol, for reasons discussed in Meron, supra note 92, at 175-86, the U.S. Army manual on the law of was amended to reflect this rule as part of the customary law of war. See Change 1, 15 July 1976, U.S. DEP’T OF THE ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para.
and facilitate rapid and unimpeded passage of all relief consignments, equipment and personnel . . . , even if such assistance is destined for the civilian population of the adverse Party” and to “protect relief consignments and facilitate their rapid distribution.” However, passage of relief supplies is still “subject to the agreement of the Parties concerned,” and it remains to be seen whether the new civilian relief provisions will prove more effective than those adopted in 1949.

V. CONCLUSION

The long-lasting influence of the Lieber Code was the result of a unique set of circumstances. Written by an eminent scholar who had experienced war and been wounded in combat, and whose own family was divided by the Civil War, the Code reflected a practical balance between humanitarian idealism and military reality. Issued at a time when the theoretical foundations of international law were shifting from natural law to positivism, the Lieber Code drew on both traditions, and adherents to either theory could accept its authority. As the mechanism for developing international law shifted from the slow growth of custom to the negotiation of multilateral treaties in diplomatic conferences, the concise structure and balanced content of the Lieber Code made it an excellent source for treaty drafters.

As the international law of war has developed over the last 150 years, some of the Lieber Code’s provisions have been retained and refined by later negotiations, while others have been rejected and even reversed. However, even when Lieber’s rules were rejected or reversed, the Lieber Code provided negotiators with a baseline summary of customary international law so they could identify practices that required revision. This paper has examined only a few examples of this process. It can truly be said that the 1863 Lieber Code remains the foundation upon which modern international humanitarian law has been constructed.

40 (1956) (“Customary international law prohibits the launching of attacks (including bombardment) against either the civilian population as such or individual civilians as such”).


275. Id., para. 1. To ensure that relief supplies are not diverted from the civilian population to the enemy armed forces, a besieging force commander who allows the passage of such supplies is specifically granted “the right to prescribe the technical arrangements, including search, under which such passage is permitted,” and to require that the supplies be distributed under the supervision of a neutral government or organization. Id., para. 3. This assumes that the parties to the conflict can agree on a neutral party to supervise distribution, and that the besieged commander accepts as legitimate the “technical arrangements” laid down by the adversary.
THE HOMESTEAD ACT, PACIFIC RAILROAD ACT AND MORRILL ACT

Professor Roger D. Billings*

I. INTRODUCTION

When the Civil War began, the federal government was just a minor player on the national scene. Its primary function was to operate the post office. The cabinet consisted of the Attorney General and the Secretaries of War, Navy, State, Treasury, Interior, and Post Office. The Secretary of War presided over an Army of around 16,000 men. The chief sources of income were customs collections and sales of public lands. There was no income tax.

When war began, the only way to raise money quickly was to borrow, and so the U.S. began to sell bonds on a massive scale. There was not a penny to spare from the war effort, but it was still possible to have far-reaching, domestic programs without spending any of the war dollars. In 1862, President Lincoln signed into law the Pacific Railroad Act, the Homestead Act, and the Morrill Act, which promoted transportation, cultivation of land, and higher education, respectively. Lincoln also signed laws creating the Department of Agriculture and authorizing an Internal Revenue Commissioner. In the midst of the country’s worst crisis, Lincoln presided over the greatest increase in the size of government of any president.

Lincoln was prepared, however, when he signed the bills creating these three Acts. As a youth, he benefitted from the availability of public land for his family’s farm. As a young legislator in Illinois, he championed “internal improvements” such as railroads, and later as a lawyer he defended the Illinois Central Railroad from lawsuits that could have crippled it. Finally, having missed out on a college education himself, he sent his son to an elite Eastern

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1. LTC. JEFFREY J. GUDMENS, STAFF RIDE HANDBOOK FOR THE BATTLE OF SHILOH, 6-7 APRIL 1862 1-2 (Combat Studies Institute Press 2002).
3. Id. at 182.
When presented with the Morrill Act, Lincoln understood the need for land grant colleges that would make a college education available to the masses.

The U.S. government financed the three acts with the only currency it had: public lands. When the thirteen colonies became the United States there were millions of acres of public lands. Virginia, for example, extended all the way into an undeveloped region now known as Kentucky. Vast new territory was added through both the Louisiana Purchase of 1804 and the Mexican War that ended in 1848. Then Indian Territory West of the Mississippi became available for settlement as wagon trains headed for San Francisco after the 1848 gold rush. Meanwhile, United States land offices sold public land in the states formed out of the Northwest Territory, present-day Ohio, Indiana, Illinois, Michigan, Wisconsin and parts of Minnesota. But in 1861 there was still plenty of public land available to finance the Pacific Railroad Act, Homestead Act, and Morrill Act.

II. THE PACIFIC RAILROAD ACTS OF 1862 AND 1864

Transportation before the Civil War moved over rivers, canals, turnpikes, and railroads. In 1825, New York City bet on the Erie Canal to keep its port prosperous. But just two years later the upstart city of Baltimore granted a corporate charter to the Baltimore and Ohio Railroad, hoping to make its port competitive with New York.

At first the railroads seemed like a weak alternative for canals and plank roads, but eventually railroads came to dominate the moving of goods and people. Champions of other modes of transportation were not pleased with the rise of railroads, however. One of their last attempts to block the progress of railroads was stopped by Abraham Lincoln. In the Rock Island case, steamboat interests argued that the mere existence of a railroad bridge was an impermissible hazard to steamboat navigation on the Mississippi. Lincoln’s arguments as counsel for the railroad produced a hung jury and the railroad bridge remained.

In 1834, the federal government began to grant rights-of-way to railroads for a width of 60-100 feet through public lands. Rights-of-way included the right to use water, earth, stone, and timber on adjacent public land for railroad

11. See Day, supra note 9, at 514.
construction, to alter the drainage and build embankments, and to take additional land for depots and water tanks. At about this time Lincoln tried, without success, to get funding for railroads from the Illinois legislature. He also proposed a scheme for selling public lands. The Panic of 1837, unfortunately, ended the early push for development of railroads.

Before the Panic, land speculators, many from the East, borrowed heavily and put prices on an upward spiral. The rising wealth encouraged the Illinois General Assembly to adopt massive financing for internal improvements such as railroads and canals. To fund them, the legislature authorized a new Illinois bank to issue notes from which the state would reap the profits. The legislature also authorized the state to issue bonds which would be paid off with tax revenues. Soon, however, funds were lacking to repay notes and bonds. As revenues dried up, Lincoln promoted a stimulus plan to keep the internal improvements going; it was unsuccessful. Insolvencies multiplied until finally the United States enacted its second bankruptcy act. This had the desired effect of helping conclude the Panic of 1842, and was promptly repealed in 1843 after it served its purpose.

As a youth, Lincoln developed many of his ideas about internal improvements by reading the Louisville Journal, which supported Henry Clay’s “American System.” Later that term was borrowed to name the so-called “Illinois System.” Clay advocated a national bank, a protective tariff, and roads and waterways for carrying goods to market. Roads, waterways, and soon railroads, were improvements Lincoln promoted unceasingly during his eight year legislative career that began in 1834. Lincoln never waivered in his support for these improvements even after the Panic was in full swing. Although he was without means himself, he demonstrated a penchant for spending public money.

In his first session of the Illinois General Assembly, Lincoln cast his votes for central government and the role he thought it should play in development of the state. He voted to spend $500,000 for the Illinois and Michigan Canal to

16. DONALD, supra note 8, at 61.
19. See CLIFTON M. NICHOLS, LIFE OF ABRAHAM LINCOLN 56 (Mast, Crowell & Kirkpatrick 1896).
21. See DONALD, supra note 8, at 61-62.
connect the Illinois River with Lake Michigan. This would provide transportation of goods from Illinois farms via the Great Lakes and Governor DeWitt Clinton’s Erie Canal all the way to the Atlantic Coast. Since President Jackson had quashed any hope of a national bank, Lincoln voted in 1835 to charter a state bank. In a special session in 1835 to strengthen support for the canal, a flood of bills were introduced for new roads, bridges, canals, and railroads. They were for the most part not adopted, only discussed, but were a harbinger of the bills adopted in 1836 that would eventually break the bank. In that 1835 session, however, Lincoln was already active on behalf of the Whig party and managed to get the legislature to authorize incorporation of another canal, the Beardstown and Sangamon Canal. It just so happened that this Canal would end at the proposed town of Huron which Lincoln had laid out as a surveyor and where he and his friends owned lots. The penurious Lincoln had not purchased his lots but was given them in payment for surveying the town.

At the General Assembly session that began in 1836, Lincoln and his Whig party would join with the Democrats and Stephen A. Douglas in a massive, profligate, and nonpartisan plan of internal improvements. The amount of debt ultimately authorized exceeded the states’ annual tax revenue. Some improvements were surely justified if they were on sound financial footing. The internal improvements might have been manageable as first proposed, but Lincoln and his Whig friends from Sangamon County, called “the long nine,” also wanted votes to move the state capitol from Vandalia to Springfield. Critics alleged that in order to win votes for Springfield, “the long nine” supported projects for extra improvements in counties all over the state. David Donald found no evidence of log-rolling. Michael Burlingame, on the other hand, wrote that, under Lincoln’s direction, the long nine did promise to support internal improvements in return for endorsement of the state capitol at Springfield.

The scale of internal improvements became unrealistic, but Lincoln seemed blissfully ignorant of the risk. He did not perceive the state’s inability to finance so many improvements, for even after the panic started he advocated for continued expenditure. Gabor Boritt calls Lincoln’s actions “optimistic

22. DAVID DONALD, LINCOLN 59 (Simon & Shuster, 1995).
23. Act of Feb. 12, 1835, 1835 Ill. Laws 7-14 (act to incorporate the subscribers to the bank of the State of Illinois).
26. See DONALD, supra note 22, at 61.
27. Id. at 62.
28. Id.
innocence.  

When the dust settled, the 1836-37 General Assembly session had authorized Illinois to sell $10,000,000 in bonds for a central railroad from Cairo to Galena (with six spur lines to satisfy communities not on the mainline), and an East West “Northern Cross” railroad connecting Jacksonville, Springfield, and Danville; $400,000 was authorized to improve five rivers for navigation; $200,000 more would be a kind of slush fund for counties not benefitting from the railroad and river money. The historian of Lincoln’s legislative years, Paul Simon, said that this General Assembly record reached an all-time low. The representatives were all born outside the state and the large majority had no legislative experience. Ten million dollars was a substantial debt for a state that at the time had a tax base of only five million dollars.33

Just as this expansive program was adopted, forces were building for a panic. Ten U.S. land offices throughout the state were busily selling public lands, often to Eastern and even foreign investors. Sales were growing fast: 354,010 acres in 1834; nearly 2,100,000 in 1835; and 3,200,000 in 1836. Resale values were rising, borrowing was excessive, and a bubble was developing. When the bubble burst, land values fell; speculators defaulted on loans they owed on land purchases; banks were no longer receiving interest income from speculators; banks suspended paying specie to those who had bought their notes (specie was gold and silver coin); bank notes, hitherto a kind of currency, fell to less than face value; and Illinois state bonds fell to fifteen cents on the dollar. It became impossible for the state to sell more bonds to continue financing the improvements, and construction came to a halt. Ultimately, reduced state tax revenue did not even cover the $600,000 annual interest on $10,000,000.35

During the 1838-39 General Assembly session the economy seemed to have stabilized, and it looked for a time as though the banks might muddle through. Lincoln joined those in the legislature who tried to keep internal improvements going, but he was in the minority. He proposed a resolution to request the U.S. Government to sell the state of Illinois the 20 million acres of remaining public lands at 25 cents an acre, for around $5,000,000. The state would then resell the acres at $1.25 and use the profits to continue work on the improvements. The Illinois legislature adopted the resolution, but the U.S. Congress ignored it. Thus ended Lincoln’s attempt at a stimulus package.37

31. See DONALD, supra note 22, at 61.
32. Id.
33. SIMON, supra note 24, at 49-50.
34. JAMES E. DAVIS, FRONTIER ILLINOIS 207, 209 (Indiana University Press, 1998).
35. DONALD, supra note 22, at 61.
37. SIMON, supra note 24, at 155-56.
In 1839, the second half of a “double dip” panic was underway. The State Bank again suspended payment of notes in specie, destroying note holders’ confidence. At a special session of the 1840 General Assembly, Lincoln did a foolish thing in an attempt to keep the Bank alive: he jumped out a window to try to deprive the legislature of a quorum.³⁸ Had he succeeded, the Bank would have been allowed temporarily to continue paying specie.³⁹ It remained for Lincoln to cash in on the back end of the panic. The law firm of Lincoln and Logan handled more bankruptcy cases in the U.S. District Court at Springfield than all but three other Illinois law firms. They handled seventy seven cases at fees of around $10.00 apiece for the mostly uncontested bankruptcies.⁴⁰

Benjamin Thomas reports that the state finally racked up $17,000,000 in debt, ceased paying interest on it in July 1841, and only completed one project, the Illinois and Michigan Canal in 1845 with the help of English investors who, after all, had purchased most of the bonds. Governor Thomas Ford dissolved the moribund banks at the same time.⁴¹ When the state stopped paying interest in 1841, work on railroads stopped and farmers began planting crops on the abandoned gradings.⁴² Only twenty four miles of track had been built.⁴³ Construction of railroads did not begin in earnest until ten years later when legal and economic conditions were favorable.

Congress made the first of many federal land grants for building railroads when it passed an act in 1850 to give 2,595,000 acres of public land to the state of Illinois.⁴⁴ Illinois was to charter a corporation for the Illinois Central Railroad and to grant the land to the newly-formed corporation.⁴⁵ The act was the first to introduce the concept of granting the railroad alternate sections of land along the route for each completed mile of track.⁴⁶ The Illinois Central was built between 1852 and 1856 with hundreds of miles of track from Chicago to Cairo. Illinois Central was also Abraham Lincoln’s most important client. Some of Lincoln’s cases established early legal precedent on the responsibility of the railroad to owners of lands adjoining the track, the railroad’s relationship with passengers and shippers, the regulation of affairs between stockholders and directors, and most importantly, the railroad’s exemption from taxation by each county through which it passed.⁴⁷

⁴⁰. DONALD, supra note 22, at 97; DIRCK, supra note 18, at 63-64.
⁴¹. THOMAS, supra note 39, at 78-79.
⁴². Id.
⁴⁵. See FRAYSSÉ, supra note 7, at 151-153.
⁴⁶. ELY, supra note 10, at 562.
⁴⁷. AMBROSE, STEPHEN E., NOTHING LIKE IT IN THE WORLD 29 (Simon & Shuster, 2000); CHARLES LEROY BROWN, E. LANE, Abraham Lincoln and the Illinois Central Railroad, 36 JOURNAL
Lincoln’s interest in railroads carried over into his presidency. The idea of a transcontinental railroad surfaced before the War, but northern and southern interests were deadlocked over the route it should take. A southern route would develop the Southwest rapidly and encourage the formation of slave states. A northern route would please the industrial interests of the East and at the same time discourage extension of slavery. Secretary of War Jefferson Davis insisted on a southern route; Abraham Lincoln and Stephen A. Douglas promoted a northern route. When the Civil War removed southern representatives and senators from Congress, the way was open for approval of a northern route. President Lincoln signed the Pacific Railroad Bill on July 1, 1862. A second piece of legislation established a common gauge for track width so that cars could be transferred between railroad companies. More railroad and land grants followed, notably the Northern Pacific Grant.

The Pacific Railway Act called for two corporations to build the transcontinental railroad. The Union Pacific would build west from the Missouri River, and the Central Pacific would build east from Sacramento. Capital stock of the Union Pacific was to be 100,000 shares at $1,000 each, totaling $100 million. President Lincoln received notice that enough stock had been subscribed in September, 1863. Still, after Union Pacific stock went on sale, only 2,000 shares were subscribed at $1,000 each, the ten percent down payment required for the $10,000 share price. This amounted to two million dollars raised from sale of stock compared to the estimated 100 to 200 million dollars cost of the railroad. The Central Pacific had already been incorporated under California laws requiring capital stock of $1,000 for each mile of a projected railroad. At first the Central Pacific was projected at only 115 miles, the distance between Sacramento and Nevada.

Capital stock could not begin to finance the railroads. The money to build would come primarily from two other sources, namely sales of land grants and
bonds. The Act granted the railroads public lands in alternate sections along their routes upon completion of a specified number of miles. The railroads were granted a right-of-way 200 feet on each side of the track plus ten alternate, odd-numbered sections on both sides of the track. These so-called checkerboard sections were twenty miles wide in states and forty miles wide in territories. Excepted from the sections were mineral land (except coal and iron) and land previously conveyed, reserved, or subject to pre-emption or homestead claims.\footnote{Pacific Railway Act §2.}

To make up for the excepted land, the Act provided for the railroads to obtain substitute land called “indemnity lands” or “lieu lands.”\footnote{Robert W. Swenson, Railroad Land Grants: A Chapter in Public Land Law, 5 Utah Law Review 456, 456-459 (1957).} In addition the Act granted the railroad the right to take timber and stone from public lands.\footnote{PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 364 (Zenger Publishing Co., 1968).} But public outcry over the generosity of these land grants caused Congress to cease making any more after 1871. An 1875 law provided for rights-of-way but no more land grants.\footnote{Act of Mar. 3, 1875, 18 Stat. 482 (1875) (granting railroads the right of way through public lands).}

The land grants under the 1862 Act were to be sold for cash to finance the railroads, but it was understood that it would take time to sell the land grants’ acreage. For this reason the Act provided for immediate cash from government-bond sales, repayable in thirty years at six percent. The Act authorized bonds for each mile completed by the Union Pacific ("UP") and Central Pacific Railroads. The amount depended on the difficulty and cost of construction; $16,000 (flat lands), $32,000 (hilly terrain) and $48,000 (mountains).\footnote{GATES, supra note 60, at 364.} But in return the government took a first mortgage on the railroad lines. The mortgage discouraged investors and so a second Railway Act was enacted in 1864 which authorized the companies to issue their own first mortgage bonds with priority over the 1862 bonds.\footnote{Act of July 2, 1864, 13 Stat. 356 (1864); see also GATES, supra note 60, at 364.} This caused construction of the transcontinental railroad to begin in earnest in 1865. It was completed in 1869, in record time.
For the next fifty years, railroads were the focus of all important business developments in the United States. Railroads were also behind important legal developments in such areas as real estate law, corporate law, antitrust law, tort law, labor law, environmental law, and administrative law. Much law was primarily made because railroads dominated the American economy and this brought them into conflict with homesteaders. The clash between railroads and homesteaders will be discussed in Part B.

With the Credit Mobilier scandal a case was made that railroads influenced white collar criminal law. The massive government support to build the transcontinental railroad inevitably led to corruption. Land grants and sale of bonds for each mile of track led to shoddy work. Companies sometimes followed winding or circuitous routes to earn more land grants and loans. They also saved money by using wood for culverts instead of masonry, light wrought iron rails instead of Bessemer rails, and fragile cottonwood trees instead of good timber.64 In spite of these cost-saving measures UP stockholders lost money because their stock, issued at $100 par, had sunk in value. T. C. Durant, The UP’s vice president, and Congressman Oakes Ames among others, devised a way to siphon off government-supplied dollars from the UP for themselves. They created a new company called Credit Mobilier of America specifically to keep all the profits derived from building the UP in their hands.65 The same stockholders that held UP stock held Credit Mobilier stock. Credit Mobilier entered into construction contracts with the UP at inflated prices. Credit Mobilier charged the UP tens of millions of dollars more than it spent on actual construction contracts. As a result, Credit Mobilier stockholders were able to

64. Larry Schweikart & Michael Allen, A Patriot’s History Of The United States 382 (The Penguin Group, 2004) (quoting Burton Folsom Jr., The Myth Of The Robber Barons: A New Look At The Rise Of Big Business In America 18 (Young America’s Foundation, 1991)).
65. 1 Dictionary Of American Biography 251 (Charles Scribners Sons, 1936).
pay themselves dividends of 348 percent in a single year. The payments to Credit Mobilier for construction contracts nearly bankrupted the UP. To keep Congress quiet, Credit Mobilier directors sold stock at nominal prices to representatives and senators, and even to Vice President Schuyler Colfax. The scandal that broke in 1872 ruined the careers of a number of Republican Congressmen.66 UP stockholders were holding nearly worthless stock while some UP officers who owned Credit Mobilier stock became wealthy.67 It signaled the beginning of disenchantment with the railroads, but by no means slowed their rapid development.68

Credit Mobilier was a flagrant example of conflict of interest and self-dealing. Corporate insiders were diverting corporate income of the UP to themselves while ordinary stockholders got nothing. Extensive congressional hearings were held to appease an angry public, and Congressmen were censured, but no one was convicted of a crime. For its time, the Credit Mobilier scandal was a sophisticated scam that did not appear to be illegal. Corporate law on shareholder rights and officers’ breach of fiduciary duty had not yet developed.69 Regulatory agencies such as the Securities and Exchange Commission were long in the future. This is not to say that what officers of Credit Mobilier did should have escaped punishment. It is a long-standing practice of Delaware courts to set aside an action that is technically legal, on grounds that it is unfair.70

An eerily similar scam came to light in December 2001 when Enron Corporation of Houston, Texas filed the then-largest bankruptcy in U.S. history.71 Enron’s main business was trading energy commodities such as electricity and natural gas. Like the U.P. executives, Enron executives enriched themselves by transferring money from the company to outside businesses controlled by themselves. They reaped huge profits before they were discovered, but this time, 130 years after the Credit Mobilier scandal broke, U.S. laws on corporate white collar crime were in place and Enron executives were indicted for fraud.72 However, as with Credit Mobilier, white collar criminal laws did not deter the Enron executives.

Railroads labor strikes were forerunners of modern labor law. In 1894, employees of the Pullman Palace Car Company, manufacturer of railroad cars,
went on strike because of a wage reduction. In solidarity the 150,000 members of the American Railway Union, led by Eugene V. Debs, went on strike. They blocked railroad transportation and passage of mail through Chicago. The federal circuit court in Chicago ordered an injunction; Debs was arrested for ignoring the injunction and found guilty of contempt. The U.S. Supreme Court denied his request for a writ of habeas corpus and validated the use of an injunction against strikers. It was a cause célèbre and spurred the process of finding better legal means to handle strikes. Abraham Lincoln’s son, Robert Todd Lincoln, a lawyer like his father, was special counsel to George M. Pullman, head of the company. We do not know exactly what role he played during the strike, but he was close to Pullman.

Tort law owes much of its development to railroads. A case in 1841 established that injuries caused by actions of railroad employees to one another could only be compensated if they occurred outside the employee’s ordinary duty. This so-called “fellow servant rule” immunized employers of all sorts from liability for employee-to-employee injuries well into the Twentieth Century. In 1852, the Supreme Court held that a railroad company was responsible for negligent actions of its employees as a matter of public policy. The Court, however, did not decide for the tort law of individual states. Between the Supreme Court’s 1852 ruling that the doctrine of respondeat superior applied to negligent actions of railroad employees, and the 1993 decision that Federal Railroad Administration regulations preempted state common-law claims based on excessive speed, cases on injuries to employees, passengers, and the public multiplied.

By 1858 railroad tort law had developed to the extent that a substantial treatise was available, and Abraham Lincoln had established a precedent that would have great consequences for railroads. In The St. Louis, Alton & Chicago Railroad Company v. Dalby, Lincoln represented Joseph Dalby in an action for trespass against his person. Dalby and his wife boarded the train at the Elkhart station. The fare was three cents a mile, but the station master was out of three-cent tickets. Dalby requested and received a note stating that fact, but
on board the train the conductor told the Dalby’s they would have to pay four cents a mile, the proper amount for tickets bought on the train. Dalby refused and got into a fight with the conductor and two brakemen.  

At trial (probably not conducted by Lincoln), four witnesses testified to Dalby’s injuries. William Miller testified, for example, that “. . . one of the men had [Dalby’s] head drawn over the arm of the seat, while the others were holding him, and pounded him in the face ten or a dozen licks . . . Dalby’s face [was] pretty badly bruised up, his face black under the eyes . . . bled considerable [sic]” The jury in the Logan County Circuit Court awarded Dalby a judgment of $1,000. This was a large amount for that day, more than an average yearly income, and Lincoln’s largest fee for an individual client.

On its appeal before the supreme court of Illinois, the railroad first argued that its employees had the authority and responsibility to enforce its rules, using reasonable force if necessary. Justice John D. Caton, writing the court’s opinion, agreed with Lincoln that the employees’ force was unreasonable. Then came the second and crucial defense based on its status as a corporation: a corporation could not be sued for inflicting unlawful physical harm to a person. Justice Caton framed this as the “great question” whether a private corporation could be liable for assault and battery. He recognized that corporations were not new but that there were few of them and they were “very little studied by the courts.” He said corporations are given powers by law and it follows that when they exercise those powers and commit a wrong they must be held responsible.

The corporation argued, however, that it had no authority to order an unlawful act to be done and an act committed by its agent was the agent’s responsibility, not the corporation’s. Justice Caton granted there was precedent in some cases holding that assault against a person could not lie against a corporation. He then concluded, stating:

The idea that a corporation cannot be liable for a beating because it has no body to be beaten, must be founded on the assumption that no party can inflict an injury which it is not capable of receiving. We confess to a want of respect when such whimsical notions are advanced by grave

84. Id. at 1-2.
87. Id.
88. Dalby, 19 Ill. at 5.
89. Dalby, 19 Ill. at 365-66.
90. Id. at 366.
91. Id.
92. Id.
93. Id. at 5.
94. Dalby, 19 Ill. at 373.
and learned judges. As well might it be said that a man cannot commit
a rape because he cannot be the subject of one.95

Thus ended any doubt in Illinois that a corporation was a legal person that
could be sued for damages in tort.

III. THE HOMESTEAD ACT OF 1862

In a sense, the Homestead Act of 1862 originated in the Land Ordinance of
1785.96 That ordinance changed the uncertain method of setting real estate
boundaries by stepping off plots from geographical landmarks. Instead, it
standardized Federal land surveys with astronomical starting points and divided
territory into six-mile square townships. Each township was divided into thirty
six sections of one square mile. A section was 640 acres and one fourth section
was 160 acres, the size of farms offered under the Homestead Act. When public
land in the West was surveyed, homesteaders could rely on the boundaries of
their 160 acre homesteads.97 Without this certainty, they might have had to settle
their boundaries in court. Abraham Lincoln’s father left Kentucky in 1816 and
moved his family to Southern Indiana because he could not afford the legal fees
to quiet title to his Kentucky farm.

95. DAN W. BANNISTER, LINCOLN AND THE COMMON LAW 208-9 (Human Services Press,
1992) (the description of Justice Caton’s opinion is derived mainly from Bannister’s account).
96. The Land Ordinance of 1785 is in Commager (ed.), Documents of American History, pp.
123-24, cited in Gates, 65 n. 60.
97. The Homestead Act of 1862, TEACHING WITH DOCUMENTS www.archives.gov/education/
lessons/homestead-act/.
Before the Homestead Act settlers were already “squatting” on public land. Early in the history of the Republic, squatters were permitted to retain as much as 320 acres provided they registered at the land office and agreed in writing that whenever the land was sold they would give quiet possession of it. Americans continued to insist on the right of preemption, the right to occupy land and pay later. Preemption was at the heart of the Homestead Act. The concept came into

its own with the Preemption Act of 1830. It permitted a “settler or occupant” on public lands who possessed and cultivated a part of his claim in 1829 to enter up to 160 acres including improvements at $1.25 per acre. The claimant had these rights for one year from the date of the Act without having to bid for them at auction. The Act was effective for only one year but it firmly established preemption in U.S. real estate law. The difference between preemption before and after the Homestead Act was that the Homestead Act provided for the first time for preempted public land that was free. Prior to the Act, sale of public lands was a significant source of income for the federal government. After the Act, some federal land, particularly former Indian lands, would continue to be held for sale, but vast acreage was also available for homesteading.

When the Homestead Act was enacted in 1862, the government bureaucracy to administer it was already in place. An Act in 1812 established the General Land office with a Commissioner who would issue patents to public lands signed by the President. At the time, the Commissioner was charged with managing about one and a half billion acres of public land and transferring it to individuals, companies, states, and railroads for cash. The Office was a bureau in the Treasury Department until 1849 when it became part of the newly-created Interior Department. It still existed in 1946 when it was renamed The Bureau of Land Management.

The General Land Office maintained branch offices in the states and later in the West when homesteaders began to make their claims. The offices were outposts of the federal government and their importance has been little appreciated by historians. Abraham Lincoln saw the political importance of the General Land Office, however, for in 1849 he tried unsuccessfully to get himself appointed Commissioner. The General Land Office employed thousands with titles such as Surveyors General, deputy surveyors, registers, receivers, superintendents of public sales, and numerous clerks. After the Homestead Act’s passage it also employed investigators of sales fraud and timber stealing.

The Homestead Act of 1862 was the same Act that President James Buchanan vetoed in 1859. Buchanan’s veto reflected Southern sentiment against the Act because southerners believed that settlers on public lands would be mostly anti-slavery. But when southerners abandoned their seats in Congress

100. GATES, supra note 60, at 225.
101. Id.
104. GATES, supra note 60, at127-28.
105. DAVID HERBERT DONALD, LINCOLN 138-40 (Simon & Shuster, 1995).
106. GATES, supra note 60, at127.
during the Civil War, the remaining Northerners took up the bill again and passed it easily. President Lincoln signed it into law May 20, 1862.107

The Homestead Act was followed by later variations, including the Desert Land Act108, Timber Culture Act109, and the Timber and Stone Act110. It offered “free land” to settlers and promoted migration to the West that would make the Union Pacific railroad profitable. Any U.S. citizen, or even an immigrant who declared intention to become a citizen, could file an application with a local land office of the General Land Office for 160 acres of surveyed public land. Thus, farmers from nearby Midwestern states, landless farmers from the East, immigrants just off the boat, single women, and even former slaves were eligible.

A homesteader had to be a head of household or 21 years of age, (apparently the drafters expected there would be filers younger than 21 who were heads of household), must never have borne arms against the U.S. Government (but this restriction against Confederate soldiers was soon lifted), and had to live on the land for five years, grow crops on it, and build a “12 by 14” dwelling. Here was an obvious drafting error, for those words invited some person to cheat by building a dwelling of 12 x 14 inches, whereas the clear meaning was 12 x 14 feet.111 If a homesteader could afford it he or she could pay the government $1.25 per acre after six months’ residency and trivial improvements ($2.50 on sections reserved to the government in the zones of the railroad grants).112 This privilege of buying after 6 months was known as the “commutation clause.”113 An exception to the five-year residency requirement was that Union soldiers could reduce the requirement by the amount of time served in the war.114

The legal process was simple, perhaps too simple, as later fraudulent activity would reveal. First, the homesteader went to the nearest land office and filed a homestead application with a $10 filing fee and a $2 commission for the land agent.115 The application described a 160-acre plot by its survey coordinates. The agent checked briefly for previous ownership claims and then the homesteader was ready to carry out the second step in the process: the five-year residency and cultivation requirement. The homesteader’s legal authority to occupy the land was the application and receipt from the agent called a “certificate of eligibility.” The third step came after five years and was called

112. See TEACHING WITH DOCUMENTS, supra note 111.
113. SHANNON, supra note 111, at 56.
114. See TEACHING WITH DOCUMENTS, supra note 111.
115. SHANNON, supra note 111, at 53.
“proving up” the claim. Two friends or neighbors of the homesteader signed an affidavit labeled, “Proof Required Under Homestead Acts, May 20, 1862 and June 21, 1866” and swore that the homesteader’s statements about building a house, making improvements and cultivating the land were true. After proving his claim the homesteader paid a final $6 fee and the Government Land Office issued a patent.116

The patent was signed by the President, sealed with the great seal of the General Land Office, and duly recorded in the record book kept for that purpose. It became a solemn public act of the government of the United States and needed no further delivery or other authentication to make it valid. The title to the land passed to the grantee and the delivery required of a deed made by a private individual was not necessary to give effect to the granting clause of the instrument.117 This patent was the equivalent of a deed of title and was often proudly displayed on the homesteader’s wall.118

HOMESTEAD.

APPLICATION  
No. 1876  
Land Office at Duluth, Minnesota  
June 12, 1877.

I, Antoni Karonowski, of St. Louis Co., Minnesota, do hereby apply to enter, under the provisions of the act of Congress approved May 20, 1862, entitled "An act to secure homesteads to actual settlers on the public domain," the 80 1/2 of 80 1/4 of Sec. 8 of Act of April 24, 1862, in Township 52 N. of Range 14 W., containing 160 0.53 acres.

Witnes to signatures:  
Stapson Seger  
J. H. Paranias  
Land Office at Duluth, Minnesota  
June 12, 1877.

I, R. C. Mitchell, Register of the Land Office, do hereby certify that the above application is for Surveyed Lands of the class which the applicant is legally entitled to enter under the Homestead act of May 20, 1862, and that there is no prior, valid, adverse right to the same.

R. C. Mitchell  
Register.
HOMESTEAD.

[Affidavit.]

Land Office at Duluth, Minnesota

June 12, 1877.

I, Antoni Jarzynowski, of St. Louis Co., Minnesota,

having filed my application, No. 1396, for an entry under the
provisions of the act of Congress approved May 20, 1862, entitled "An act
to secure homesteads to actual settlers on the public domain," do solemnly
swear, that I have declared my intention to

become a citizen of the United States,

that I am a married man, and

that I am over the age of 21 years;

that said application, No. 1396, is made for the purpose of actual
settlement and cultivation; that said entry is made for my own exclusive
benefit and not directly or indirectly for the benefit or use of any other
person or persons whomsoever; neither have I heretofore perfected or
abandoned an entry made under this act.

Antoni Jarzynowski

Witness to signature

Stephen Longin

Subscribed and sworn to this 12th day

of June, 1877, before

V. H. Presson

Receiv of the Land Office.
It is hereby certified, That pursuant to the provisions of the act of Congress, approved May 20, 1862, entitled "An act to secure homesteads to actual settlers on the public domain," Daniel Lusman has made payment in full for the W1/4 of NW1/4 of Section 26, in Township 41, Range 50, containing 160 acres. Now, therefore, be it known, That on presentation of this Certificate to the Commissioner of the General Land Office, the said Daniel Lusman shall be entitled to a Patent for the Tract of Land above described.

Henry M. Alling, Jr. Register.
The United States of America,

TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETING:

Whereas there has been deposited in the General Land Office of the United States a certificate of the Register of the Land Office at Marquette, Michigan, whereby it appears that pursuant to the Act of Congress approved 26th May, 1864, "To open lands next to actual settlers on the public domain," and the acts supplemental thereto, the claim of James Pinnington,

has been established and duly patented in conformity to law for the east half of the north west quarter and the west half of the south east quarter of the

ten sections, persons we township forty-four north range one east of Michigan meridian in Michigan containing one hundred and sixty acres.

according to the official act of the Survey of the said land returned to the General Land Office by the Surveyor General.

You know ye, that there is therefore granted by the United States unto the said

James Pinnington

the tract of land

described to have and to hold the said tract of land, with the appurtenances thereof, unto the said

James Pinnington

and his heirs and assigns forever.

In testimony whereof I, Benjamin Harrison, President of the United States of America, have caused these letters to be made Patent, and the Seal of the General Land Office to be hereunto affixed.

Given under my hand, at the City of Washington, the fourth day of December, in the year of Our Lord one thousand eight hundred and eighty-four, and of the Independence of the United States the one hundred and forty-seventh.

By the President, Benjamin Harrison.
As with all legal procedures, homesteading was susceptible to fraud. For example, it was not difficult for a speculator who did not homestead the land to prove a claim with two false witnesses on the affidavit. This enabled speculators to become “looters of the public domain.” One of them, S.A.D. Puter, wrote a book by that title from his prison cell after he was convicted for conspiracy to defraud the government.119 Because he was convicted, there is reason to believe him. He described how the California Redwood Company hired men to file on land covered with dense redwood forests in the Northern part of Humboldt County. At the time, persons wishing to file claims under the Timber and Stone Act were not required to make a personal examination of the land they wished to file on, or to go to the land office to make final proof. All that was necessary was for the filer to exhibit his first papers to show that he was a citizen of the United States, make oath to that effect, or declare his intention to become a citizen.121 Mr. Puter stated:

Under these conditions, the company was enabled to run men into the land office by the hundreds. I have known agents of the company to take at one time as many as twenty-five men from “Coffee Jack’s” sailor boarding house in Eureka to the county court house, where they would take out their first papers, declare their intention to become citizens of the United States, after which they would proceed direct to the land office and make their filings, all the location papers having previously been made out. Then they would appear before Fred W. Bell, a notary public, and execute an acknowledgement of a blank deed, receive a stipulated price of $50, and return to their ships, or to the boarding house from whence they came. The description of the tract filed on was afterwards inserted and the transfer of title completed to the corporation . . . the entire body of land embraced in a number of different townships, was consummated to a Scotch syndicate.122

The General Land office noticed the rush for issuance of patents. Special Agent B.F. Bergin, described as “the fourth one sent out, and made of the right kind of stuff, and could not be purchased,” reported the fraud, and the Land Office cancelled 150 to 200 entries.123 Company agents were prosecuted, although “their cases were carried through the courts from one administration to the other at an enormous expense.”124 The happy ending was that bona fide settlers filed on the cancelled entries and eventually received patents.125

121. Puter, supra note 119, at 18.
122. Id.
123. Id.
124. Id.
125. Id.
In spite of fraud, the Homestead Act brought high hopes to many settlers. An 1862 article in the magazine, Continental Monthly, reflected the optimism the Act engendered and reminded the reader that the Act was passed during the Civil War.

As it is a blessed thing for the poor and landless to receive, substantially as a gift, a farm from the Government, where they and their children may till their own soil, and enjoy competence, freedom, and free schools, let them never forget, that this was the act of the North, and opposed by the South. If the rebels succeed, they will hold the public domain in their States and Territories for large plantations, to be cultivated by slaves, and sink their poor whites, as nearly as practicable, to the level of their slaves, in accordance with their theory, that capital should own labor.126

The enthusiasm of pioneer families for homesteading is reflected in an autobiographical novel of Laura Ingalls Wilder, who wrote the Little House on the Prairie series. In her book, “By the Shores of Silver Lake,” she portrays her “Ma” as reluctant to go West. Her “Pa” says to her:

“Listen to reason, Caroline . . . We can get a hundred and sixty acres out west, just by living on it, and the land’s as good as this is, or better. If Uncle Sam’s willing to give us a farm in place of the one he drove us off of, in Indian Territory, I say let’s take it. The hunting’s good in the west, a man can get all the meat he wants.” 127

Later, Ma tells her daughters that Pa started for the claim before sunup. She says,

“He didn’t want to go and leave us in this rush . . . but he had to. Someone else will get the homestead if he doesn’t hurry. We had no idea that people would rush in here like this, and March hardly begun.”128

When Pa returns he tells his daughters, “Well girls, I’ve bet Uncle Sam fourteen dollars against a hundred and sixty acres of land that we can make our claim for five years.”129

Without doubt, many pioneer homesteaders did succeed, and the Homestead Act was responsible for rapid settlement of the West. But those who succeeded must have been indomitable, for the odds were stacked against them. In the first place they were competing with land grants to railroads and states, the cash sale


128. Id. at 227.

129. Id. 237.
system, the Indian land policy, the acts granting warrants to ex-soldiers and their heirs, and land grants to states for colleges under the Agricultural College Act (also known as the Morrill Act). 130

Other lands, too, were held for sale and not available for homesteading. For example, millions of prime acres were held by the government for sale at auction. The government acquired millions of acres from Indians as a result of the policy of concentrating them on reservations. These too were held for sale and not available to homesteaders. 131 Roughly 125 million acres of railroad lands, 140 million acres of state lands, 100 million acres of Indian lands, and 100 million acres of federal lands held for sale were off-limits to homesteaders. 132 In contrast, the total number of acres distributed by the Homestead Act was 270 million. 133

The massive giveaway of public lands to railroads, and the homesteaders’ claims on lands beside the railroad grants, inevitably led to real estate litigation. The problem stemmed from claims of homesteaders who settled on lands not yet surveyed but within the limits of the general route of the Northern Pacific Railroad. The Northern Pacific Railroad Company was created by an Act of Congress signed by President Lincoln on July 2, 1864. 134 The company fixed a general route of its road from Lake Superior to Puget Sound, including land within forty miles thereof, by filing a plat of the route with the Commissioner of the General Land office on August 20, 1873. On November 1, 1873 the Commissioner sent the following letter to the register and receiver of the land office for the district in which the railroad land was located:

Gentlemen:-The Northern Pacific Railroad Company having filed in this department a map showing the general route of their branch line, from Puget Sound to a connection with their main line near Lake Pend d’Oreille in Idaho territory, I have caused to be prepared a diagram which is herewith transmitted, showing the 40-mile limits of the land grant along said line, extending through your district, and you are hereby directed to withhold from sale or entry all the odd-numbered sections falling within these limits not already included in the withdrawal for the main-line period. The even sections are increased in price to $2.50 per acre, subject to pre-emption and homestead entry only. This withdrawal takes effect from August 15th, 1873, the date when the map was filed by the company with the Secretary of the

130. GATES, supra note 102, at 652-81.
131. Id. at 690-61.
132. Id. at 662.
Problems for homesteaders developed when they settled on lands within the forty-mile limits of the odd-numbered sections. The railroads claimed that the settlers were not entitled to occupy land along the general route. In 1886 the Supreme Court ruled unanimously in favor of the railroads. The court sustained the action of the General Land Office in refusing a homesteader’s application to enter land within the forty-mile limit, as shown by a map of general route, and it confirmed the title of the railroad company.

Seventeen years later the Supreme Court overruled this precedent. In 1881, three years before the definite route of the railroad was established, Henry Nelson went upon land within the general route, and continuously resided on it. The land was at that time unsurveyed and would not be surveyed until 1893. As soon as it was surveyed, Nelson attempted to enter his claim under the Homestead laws in the proper district land office. His application was rejected by the register and receiver, however, because in their opinion it conflicted with the grant of the Northern Pacific Railroad Company.

The claims of both parties were made difficult by the poor drafting of the sections 3 and 6 of the 1864 Act. The third section stated, among other things:

That there be, and hereby is granted to the ‘Northern Pacific Railroad Company,’ its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time [of definite location], any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the

137. Id. at 73.
139. Id. at 113.
Interior, in alternate sections, and designated by odd numbers, not more
than 10 miles beyond the limits of said alternate sections . . .” The 6th section said, among other things:

And be it further enacted, That the President of the United
States shall cause the lands to be surveyed for 40 miles in width on both
sides of the entire line of said road, after the general route shall be
fixed, and as fast as may be required by the construction of said
railroad; and the odd sections of land hereby granted shall not be liable
to sale, or entry, or pre-emption, before or after they are surveyed,
except by said company, as provided in this act.

. . . But the provisions of the act of September, eighteen hundred and
forty-one, granting pre-emption rights, and the acts amendatory thereof,
and of the act entitled ‘An Act to Secure Homesteads to Actual Settlers
on the Public Domain,’ approved May twenty, eighteen hundred and
sixty-two, shall be, and the same are hereby, extended to all other lands
on the line of said road, when surveyed, excepting those hereby granted
to said company. And the reserved alternate sections shall not be sold
by the government at a price less than two dollars and fifty cents per
acre, when offered for sale.140

Section 6 said that the odd sections should not be liable to sale, entry, or pre-
emption before or after they were surveyed, except by the company. On the
other hand, Section 3 secluded from its grant any lands “occupied by homestead
settlers” at the time of the definite location of the road. When Nelson occupied
the land in 1881, the railroad had only a general route; the definite location
would not be established until 1884 and the land would not be surveyed until
1893.141

Mr. Justice Harlan, writing for a divided Court, said that “the railroad
company acquired no vested interest in any particular section of land until after a
definite location as shown by an accepted map of its line; and that until definite
location the land covered by the map of general route was a ‘float’, that is at
large.”142 Therefore, under the Homestead Act of 1862 Nelson could file a claim
to surveyed land. When the land in question was finally surveyed in 1893,
Nelson promptly filed his claim. The court held that “[His] continuous
occupancy of the land, with a view, a good faith, to acquire it under the
homestead laws as soon as it was surveyed, constituted, in our opinion, a claim
upon the land.”143

By 1871, the public reaction against large land grants caused the United
States to cease granting subsidy lands to railroads. It continued, however, to
grant generous rights-of-way well into the twentieth century.144 The policy for
granting rights-of-way was embodied in the General Railroad Right-of-Way Act of 1875.\textsuperscript{145} The Act granted any railroad a 200-foot right-of-way through the public lands while discontinuing the checkerboard land grants.\textsuperscript{146}

Since 1920, almost half of the 270,000 miles of rail lines have gone out of use.\textsuperscript{147} The National Trails System Act Amendments of 1983\textsuperscript{148} preserve discontinued railway rights-of-way by banking them for possible future railroad use, and authorizing interim use as recreational trails.\textsuperscript{149} Pursuant to the Act, rights-of-way that a railroad abandons after October 4, 1988, revert to the government.\textsuperscript{150} Courts have ruled inconsistently that right-of-way grants conveyed fee simple absolute to the railroads, or fee simple determinable with an implied possibility of reverter upon abandonment, or an easement.\textsuperscript{151} In 2005, the Federal Circuit rejected the government’s ownership and control over rights of way in which successors to homesteaders claimed interest.\textsuperscript{152} The case dealt with claims to an 83.1 mile stretch of right-of way in Idaho that was to be converted to a recreational trail.\textsuperscript{153} The court held that many of these successors were entitled to compensation under the Fifth Amendment’s Takings Clause.\textsuperscript{154} Litigation continues today over grants of public land under the 1862 Homestead and Railway Acts.\textsuperscript{155}

By far the most serious competitor for public lands was the railroad. Under the Pacific Railroad Act and other acts, Congress granted lands to railroads that enabled them to pass through the best lands in the very regions open to homesteading. The Railroad Act gave railroads alternating sections along their track that were held for sale. So-called “administrative withdrawals” caused more acres to be unavailable for homesteading, at least temporarily.\textsuperscript{156} The General Land Office withdrew millions of acres from homesteading in advance of the route a railroad might take. The withdrawals were to protect the railroads from land speculators.\textsuperscript{157} To make matters worse, the railroads delayed their

\begin{enumerate}
\item[146.] Id.
\item[147.] Hash v. U.S., 403 F.3d 1308, 1311 (2005).
\item[149.] 16 U.S.C. § 1247(d) (1983).
\item[150.] 16 U.S.C. § 1248(c) (1988).
\item[152.] Hash, 403 F.3d at 1308.
\item[153.] Id. at 1311.
\item[154.] See Id. at 1313-1323.
\item[155.] See, e.g., Yellowstone River, LLC v. Merriweather Land Fund I, LLC, 2011 Mont. 263 (evidence was sufficient to overcome inference that U.S. intended to reserve an easement across land sections granted to railroad by Northern Pacific Act).
\item[157.] Id. at 119-120.
\end{enumerate}
surveys and final selections of land as long as possible in order to avoid local real estate taxes. The Homestead Act itself limited homesteading to eighty acres within the limits of a railroad grant. As a result, homesteaders had to settle for less fertile land far from the track so that it was costly for them to ship their products to market. The cost included not just getting crops and livestock to the railhead, but also the excessive fees the railroads charged. Homesteaders who made their claims near the projected railroad right of way found that they had to fight for their land in court.

IV. THE FARMERS’ REVOLT AND ANTI-TRUST LAW

The 160-acre homestead often proved inadequate for farming or raising livestock. Scarcity of water west of the 100th meridian reduced yields. Without trees, homesteaders were forced to build sod houses which they hoped would withstand hailstorms, drought, prairie fires, blizzards, and wind. They saw the railroads as their oppressors, and their optimism turned to despair. They began to organize themselves to oppose the railroads politically and to petition for relief through the courts and legislatures. Their clash with railroads began a movement that changed American law and shifted regulatory power to Washington.

The farmers’ revolt began in 1867 when Oliver H. Kelley and other clerks in the Bureau of Agriculture founded the Patrons of Husbandry to address the poverty and isolation of farmers. When the panic of 1873 began, the Patrons had “Granges” (lodges) in all but four states. Soon after there were 800,000 members in 20,000 Granges. They were especially active politically in Illinois, Iowa, Wisconsin, Minnesota, Missouri, Kansas, Nebraska, and California, where they elected candidates to the legislatures and judges to the courts. Their aim was to enact state laws to regulate railroad and warehouse charges and other perceived abuses. Early success came in Illinois where the 1870 Constitution directed the legislature to “pass laws to correct abuses and to prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads of the state.” The legislature responded. It prohibited

158. Id.
161. Id.
163. Id. at 308-09.
165. MORISON & COMMAGER, supra note 66, at 207-9.
discrimination, established a maximum rate, and created a Railway and Warehouse Commission to regulate roads, grain elevators, and warehouses.\(^{167}\) By 1874, similar laws were enacted in Iowa, Minnesota, and Wisconsin. Critics complaining of socialism considered Wisconsin’s so-called “Potter law” especially drastic.\(^{168}\) By 1876 they had brought the issue of the laws’ constitutionality before the Supreme Court, asking the Court to rule that an Illinois statute regulating grain elevator charges was a deprivation of property, without due process of law in violation of the Fourteenth Amendment.\(^{169}\) In *Munn v. Illinois* Chief Justice Waite wrote an opinion that upheld the statute on the ground that the states’ historical right of police power includes the right to regulate ferries, common carriers, inns, and so forth.\(^{170}\) It has been called one of the most far-reaching decisions in American law.\(^{171}\) Justice Wait wrote:

> When private property is affected with a public interest it ceases to be *juris privati* only. . . . Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has created.

Dismissing the allegation that rate-fixing by a legislative commission did not constitute due process of law, he wrote:

> It is insisted, however, that the owner of property is entitled to a reasonable compensation for its use . . . and that what is reasonable is judicial and not a legislative question . . . The controlling fact [however] is the power to regulate at all. If that exists, the right to establish the maximum charge, as one of the means of regulation, is implied . . . We know that this is a power which may be abused; but that is no argument against its existence. For protection against abuses by legislatures, the people must resort to the polls, not to the courts.

In three other cases decided the same day, the Court said that Granger laws establishing maximum freight and passenger rates did not violate the interstate commerce clause.\(^{172}\) The court said that the railroad:

> is employed in state as well as interstate commerce, and until Congress acts, the State must be permitted to adopt such rules and regulations as

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169. Munn v. Illinois, 94 U.S. 113 at 123 (1876).
170. *Id.* at 125.
may be necessary for the promotion of the general welfare of the people within its own jurisdiction, even though in so doing those without may be indirectly affected.\textsuperscript{173}

\textit{Munn v. Illinois} advanced the cause for government regulation of business and ended the notion that businesses, or at least those with an “affected public interest,” were free to set prices and engage in whatever practices they wished. It also opened the door to federal regulation of interstate commerce a few years later.

\textit{Munn v. Illinois} dealt a blow to champions of laissez-faire economics. These champions reorganized, however, and achieved victory ten years later in the \textit{Wabash} case.\textsuperscript{174} The Supreme Court ruled in \textit{Wabash} that state regulation of interstate railroad rates was preempted by the interstate Commerce Clause.\textsuperscript{175} Since most freight shipments were across state lines, the decision rendered most state legislation invalid. The reaction to the \textit{Wabash} case resulted in enactment of the law that created the Interstate Commerce Commission (I.C.C.).\textsuperscript{176}

The I.C.C. had power to hold hearings and issue orders to prohibit charges for interstate rail transportation that were not “reasonable and just.”\textsuperscript{177} Enforcement by the I.C.C. was accomplished by petition to federal courts. The commission also prohibited rebates or preferential treatment of any shipper. This prohibition was compromised with respect to long haul-short haul rate differentials because it had to be applied “under substantially similar circumstances and conditions.” Finally, carriers had to file public rate schedules and information on financial matters and operations with the I.C.C.\textsuperscript{178}

With weak enforcement authority and unclear provisions, the commission was destined to be ineffective. It lost in all its attempts to enforce its rulings through the courts, but the precedent was established that federal agencies could regulate businesses. Finally, in 1906 the Hepburn Act gave the I.C.C. power to determine a just and reasonable rate upon the filing of a complaint.\textsuperscript{179} Historians have written that the I.C.C. “was the first of the many administrative boards which were to become so important as to constitute a fourth department of the government.”\textsuperscript{180}

The populist attack on railroads that led to creation of the I.C.C. continued with the development of anti-trust law. An early form of business trust was called “pooling,” defined as gentlemen’s agreements between railroad directors to maintain prices, divide business, and pro-rate profits. Pooling among

\begin{footnotesize}
\begin{enumerate}
\item[173.] \textit{Peik}, 94 U.S. at 178.
\item[174.] \textit{Wabash}, St. Louis & Pacific R.R. Co. v. Illinois, 118 U.S. 557 (1886).
\item[175.] \textit{Id.} at 577.
\item[176.] Interstate Commerce Act, ch. 104, 24 Stat. 379 (1877).
\item[177.] \textit{Id.} at §1.
\item[178.] JAMES W. ELY, JR., \textsc{Railroads and American Law} 90-93 (University Press of Kansas, 2001); Interstate Commerce Act §§ 1, 3, 6, 16.
\item[180.] NEVINS & COMMAGER, \textit{supra} note 164, at 314.
\end{enumerate}
\end{footnotesize}
railroads began in 1872 and was prohibited in The Interstate Commerce Act of 1887. The Supreme Court in the Trans-Missouri Freight Association Case ruled that the Sherman Antitrust Act of 1890 also prohibited pooling. Railroads stayed in the cross-hairs of the Sherman Act enforcers until the famous Northern Securities case of 1904; this was the case that made President Theodore Roosevelt famous as a “trustbuster.” The court ruled that Northern Securities, a holding company for the Northern Pacific, Great Northern, and Chicago, Burlington, and Quincy railroads, constituted a combination in potential restraint of trade and violated the Sherman Act. After Northern Securities, Roosevelt was emboldened to direct the attorney general to file actions against the meat-packer trust, the tobacco trust, and the Standard Oil Company. Each was successful.

V. LAND-GRANT COLLEGES

President Lincoln signed the Morrill Act into law on July 2, 1862. In a sense it was enacted to provide an alternative to classical education at the elite liberal arts colleges. Those colleges, Princeton, Columbia, Yale, Harvard, and others, emphasized the classics and learning for its own sake, following the model of Oxford and Cambridge. Their founders were often religious denominations and their training was in what was then called the liberal arts. It was thought that attendance at elite colleges was the way to get ahead, and so Abraham Lincoln, a relatively wealthy but self-educated Illinois lawyer, sent his son, Robert Todd Lincoln, to Harvard. The land grant colleges were to equalize opportunity for education and branch out from the liberal arts, while not altogether leaving them behind. The Act granted land to states and permitted them to use the proceeds for “the endowment, support, and maintenance of at least one college where the leading object shall be, without excluding other scientific and classical studies and including military tactics, to teach such branches of learning as are related to agriculture and the mechanic arts . . . .”

The mention of military tactics reflected the fact that the North was at war, but the long-range objective was to establish agriculture and engineering...
schools. To fund the universities, the Act granted each state 30,000 acres of public land for each senator and representative in Congress based on appointments under the census of 1860. The land (or a substitute for land called “scrip”) was to be sold and the proceeds invested in “safe” bonds for the “endowment, support and maintenance of at least one college.” If any portion of this endowment was diminished or lost then the state had to replace it so that “the capital of the fund shall remain forever undiminished.”

Eventually, every state of the union took up Congressman Morrill’s offer. Some states established more than one land grant. The list reads as follows:

**Alabama**
- Alabama A&M University, Normal
- Auburn University, Auburn
- Tuskegee University, Tuskegee

**Alaska**
- Ilisagvik College, Barrow
- University of Alaska, Fairbanks

**American Samoa**
- American Samoa Community College, Pago Pago

**Arizona**
- Diné College, Tsaile
- University of Arizona, Tucson
- Tohono O’Odham Community College, Sells

**Arkansas**
- University of Arkansas, Fayetteville
- University of Arkansas, Pine Bluff

**California**
- D-Q University, (Davis vicinity)
- University of California System-Oakland as Headquarters, Oakland

**Colorado**
- Colorado State University, Fort Collins

**Connecticut**
- University of Connecticut, Storrs

**Delaware**
- Delaware State University, Dover
- University of Delaware, Newark

**District of Columbia**
- University of the District of Columbia, Washington

**Florida**
- Florida A&M University, Tallahassee

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191. *Id.* at Preamble (2).
192. *Id.* at § 4(8).
193. *Id.* at § 5(9).
University of Florida, Gainesville

Georgia
Fort Valley State University, Fort Valley
University of Georgia, Athens

Guam
University of Guam, Mangilao

Hawaii
University of Hawaii, Honolulu

Idaho
University of Idaho, Moscow

Illinois
University of Illinois, Urbana

Indiana
Purdue University, West Lafayette

Iowa
Iowa State University, Ames

Kansas
Haskell Indian Nations University, Lawrence
Kansas State University, Manhattan

Kentucky
Kentucky State University, Frankfort
University of Kentucky, Lexington

Louisiana
Louisiana State University, Baton Rouge
Southern University and A&M College, Baton Rouge

Maine
University of Maine, Orono

Maryland
University of Maryland, College Park
University of Maryland Eastern Shore, Princess Anne

Massachusetts
University of Massachusetts, Amherst

Michigan
Bay Mills Community College, Brimely
Michigan State University, East Lansing
Saginaw Chippewa Tribal College, Mount Pleasant

Micronesia
College of Micronesia, Kolonia, Pohnpei

Minnesota
Fond du Lac Tribal & Community College, Cloquet
Leech Lake Tribal College, Cass Lake
University of Minnesota, St. Paul
White Earth Tribal and Community College, Mahnomen
Mississippi
Alcorn State University, Lorman
Mississippi State University, Mississippi State

Missouri
Lincoln University, Jefferson City
University of Missouri, Columbia

Montana
Blackfeet Community College, Browning
Chief Dull Knife College, Lame Deer
Fort Belknap College, Harlem
Fort Peck Community College, Poplar
Little Big Horn College, Crow Agency
Montana State University, Bozeman
Salish Kootenai College, Pablo
Stone Child College, Box Elder

Nebraska
Little Priest Tribal College, Winnebago
Nebraska Indian Community College, Winnebago
University of Nebraska, Lincoln

Nevada
University of Nevada, Reno

New Hampshire
University of New Hampshire, Durham

New Jersey
Rutgers University, New Brunswick

New Mexico
Navajo Technical College, Crownpoint
Institute of American Indian Arts, Santa Fe
New Mexico State University, Las Cruces
Southwestern Indian Polytechnic Institute, Albuquerque

New York
Cornell University, Ithaca

North Carolina
North Carolina A&T State University, Greensboro
North Carolina State University, Raleigh

North Dakota
Fort Berthold Community College, New Town
Cankdeska Cikana Community College, Fort Totten
North Dakota State University, Fargo
Sitting Bull College, Fort Yates
Turtle Mountain Community College, Belcourt
United Tribes Technical College, Bismarck

Northern Marianas
Northern Marianas College, Saipan, CM
Ohio
Ohio State University, Columbus

Oklahoma
Langston University, Langston
Oklahoma State University, Stillwater

Oregon
Oregon State University, Corvallis

Pennsylvania
Pennsylvania State University, University Park

Puerto Rico
University of Puerto Rico, Mayaguez

Rhode Island
University of Rhode Island, Kingston

South Carolina
Clemson University, Clemson
South Carolina State University, Orangeburg

South Dakota
Oglala Lakota College, Kyle
Si Tanka University, Eagle Butte
Sinte Gleska University, Rosebud
Sisseton Wahpeton Community College, Sisseton
South Dakota State University, Brookings

Tennessee
Tennessee State University, Nashville
University of Tennessee, Knoxville

Texas
Prairie View A&M University, Prairie View
Texas A&M University, College Station

Utah
Utah State University, Logan

Vermont
University of Vermont, Burlington

Virgin Islands
University of the Virgin Islands, St. Croix

Virginia
Virginia Polytechnic Institute and State University, Blacksburg
Virginia State University, Petersburg

Washington
Northwest Indian College, Bellingham
Washington State University, Pullman

West Virginia
West Virginia State University, Institute
West Virginia University, Morgantown

Wisconsin
The Second Morrill Act of 1890194 provided additional endowments for all land-grants on condition that there were to be no distributions to states that made distinctions of race in admissions. But it is said that “establishment and maintenance of colleges separately for white and colored students shall be held to be a compliance with the provisions of this act if the funds received in such State or Territory be equitably divided . . .”,195 This separate but equal provision led to the establishment of land grant colleges for blacks known as “the 1890 land-grants.”196 There are also twenty nine Native American tribal colleges called the “1994 land-grants” and a number of small Hispanic-oriented land-grant institutions.197

Today, agricultural enrollments are less than ten percent of land-grant enrollments, and numerous non-land grant public universities have been founded. The contribution to a land grant’s budget from the original land-grant endowment is tiny. But remarkably, as lecturer Justin Smith Morrill reported in 2004, the 105 land-grant universities enrolled about three million students, awarded one-third of all U.S. bachelor’s degrees, one-third of all masters degree, sixty percent of all Ph.D.’s and seventy percent of all engineering degrees.198

Are land-grant universities remembered today only for historical reasons? The answer is no, because they still maintain a special relationship with the federal government. The U.S. Department of Agriculture’s Cooperative State Research Service (CSRS) administers Hatch Act199 and Morrill-Nelson200 funds for the Land-Grants. These funds are granted for regional scientific research. The Smith-Lever Act201 established funding for a system of extension services. “Extension,” explains the National Institute of Food and Agriculture (NIFA), means that land-grant institutions “extend” their resources, solving public needs

195. Id. at § 1.
196. Id.
197. See 7 U.S.C. § 301; See also Arnold P. Appleby, Milestones in the Legislative History of U.S. Land-Grant Universities 13-14 (Oregon State University 2007).
198. Martin E. Jischke, President of Purdue University, Adapting Justin Morrill’s vision of a New Century: The Imperative of Change for Land-Grant Universities, Speech before the Association of State Universities and Land-Grant Colleges Annual Meeting, November 14, 2004, San Diego, CA (transcript available at www.usda.gov/about/speeches/04_Morrill.html (last visited 10/18/2011)).
with college or university resources through non-formal, non-credit programs. NIFA distributes Congressionally appropriated formula grants annually to supplement state and county funds. Today NIFA supports 2,900 extension offices and a website with information from Land-Grant University System faculty and staff experts.

There seem to be few legal problems growing out of the government’s continuing involvement with land-grants, but there could be looming financial problems. For example, a single program, the “Expanded Food and Nutrition Education Program,” announced formula grants under section 3(d) of the Smith-Lever Act to be “used to assist all states in carrying out a program of extension activities designed to employ and train professional and paraprofessional aids to engage in direct nutritional education of low-income families and in other appropriate nutrition education programs.” The amount available for this single land grant program in fiscal year 2009 was $65,709,480.

VI. CONCLUSION

There can be no doubt that legislation enacted during the Civil War had a major impact on the law. Critics of the Pacific Railroad and Homestead Acts point out the antitrust problems caused by railroads and how few homesteaders stuck it out to become successful farmers. It is true that many homesteaders abandoned their farms or were forced to rent from land speculators, and that railroads constantly had to defend themselves before the Supreme Court. But the Homestead and Railroad Acts together spurred much faster development of the West than would have been the case without them. In the two decades after the Civil War, production of corn, wheat, and oats more than doubled as did the number of cattle, sheep and hogs. Of approximately four million homesteaders who filed claims under the Act, forty percent “proved up” on their claims and earned a deed. Homesteaders settled 270 to 285 million acres or ten percent of U.S. land. Forty-five percent of Nebraska’s acres were distributed under the Act.

Homesteaders survived arid farming conditions, manipulation of available lands by fraudulent applicants, monopoly of water resources, and many other obstacles. They left over 93 million descendants whose energy makes U.S.

203. Id.
204. Id.
206. NEVINS & COMMAGER, supra note 164, at 284.
208. Id.
farms the most productive in the world. Homesteading continued for 123 years. The Federal Land Policy and Management Act of 1976 repealed the Homestead Act except in Alaska where homesteading was permitted until 1986. Ken Deardorff, a Vietnam veteran, filed a claim for eighty acres along the Stony River in 1976 and received his deed in 1988. He is recognized as the last homesteader.

The rapid building of the Pacific railroads gave rise to giant steel mills that produced farm machinery, rails, railroad cars and engines. The East and West coasts were connected because of engineering heroics that caused the transcontinental railroad to be finished in record time. The railroad stimulated trade by eliminating the dangerous, slow, and expensive voyages between east and west coasts around Cape Horn. Hundreds of thousands of immigrants moved West with a new spirit of optimism. Communications were revolutionized as the telegraph along the tracks connected San Francisco with New York and trains quickly delivered the mail. A minor consequence of the railroad’s completion was that it put the pony express out of business. In its place, a national culture developed around a thousand new towns along the rails.

And what of the Morrill Act? It is hard to find serious criticism of it. In every state a great research university exists because of it, and that university has stimulated many imitators. Perhaps the best scholars produced at land grant universities can now solve the lingering problems that stem from The Homestead and Pacific Railroad Acts.

209. Id.
SALMON P. CHASE AND THE LEGAL BASIS FOR THE
U.S. MONETARY SYSTEM

Dr. Roger D. Bridges*

It was “Four score and” six years, with apologies to Abraham Lincoln, from the founding of the United States until it had created a uniform national currency. For most of those years, the nation had relied on unreliable state banks to furnish the bulk of its monetary circulation. The amount of gold and silver coinage in circulation fell far short of meeting the nation’s needs, even in the best of times.

Few Americans realize there was a period in the nation’s history when there was no national currency. In 1860 there were approximately 1,600 state banks issuing bank notes that served as the nation’s money. Of that money, there were more than 13,000 different designs in various denominations. Monetary historians estimate that approximately half of those notes were bogus, issued by wildcat banks, or outright forgeries.

There was national money, of course, but it consisted only of gold and silver coins, as well as some smaller coins of base metals. After President Andrew Jackson killed the Second Bank of the U.S., a bank he referred to as the hydra-headed monster, the nation required that all taxes, tariffs, and other payments due the United States be paid in specie. And it paid all bills the same way. But commercial transactions among the residents of the nation were mostly carried on by the use of currency printed by state chartered banks. Large transactions required the actual transfer of bullion by wagons from the payer to the payee.

On the eve of the Civil War, the United States was deeply in debt, indeed, it was the largest peacetime debt in American history up to that time. In his Recollections, penned some 30 years after the Civil War, John Sherman observed that “On the meeting of Congress in December, 1860, the treasury was empty. There was not enough money even to pay Members of Congress.” Historian Jane Flaherty notes that “By 1860, the ‘Buchaneers’ had created the largest debt ever accumulated by an administration without engaging in war.”

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With only $500,000 in the treasury, Buchanan’s last Secretary of the Treasury, John A. Dix, was facing bills totaling almost $10 million. Indeed, the situation was so dire at the end of the Buchanan Administration that Dix requested Congressman Sherman introduce a resolution asking states to guarantee a loan to the Federal Government. The Buchanan administration had met the continuing shortfalls by borrowing money at increasingly disadvantageous rates. By the time Dix attempted to pay the U.S.’s debts, it was no longer possible to borrow money at reasonable rates. When Abraham Lincoln took the oath of office, expenses for the previous year had exceeded income by $25.2 million and the nation had a debt of $76.4 million.2

In the months between his election and inauguration, southern states, led by South Carolina, seceded, taking with them the southern ports, a major source of tariff revenue. While the nation was disintegrating, Lincoln was putting together his cabinet. Recognizing the need for strong fiscal management in the face of the nation’s political and economic problems, he turned to Ohio Senator Salmon P. Chase to head the Treasury Department. A perennial candidate for the Presidency, Chase had numerous negative and positive attributes for the task. Born in 1808, he was 53 when he was chosen to head the Treasury. A successful lawyer, he was well known for his anti-slavery views and his defense of runaway slaves in Ohio. He was an early advocate of the hard money views of the Jacksonian Democracy and had tried, unsuccessfully, to lead that party to adopt his anti-slavery views. In his first term as Senator from Ohio, he had aligned himself with the Democratic Party, although, he insisted that he was a “free” Democrat. As such, he was never accepted as a regular Democrat. He had been

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a founder and early leader of the Liberty Party, and later a founder of the Free Soil Party. As such, with a coalition of Democrats, Chase had been elected to the Senate from Ohio, where he aligned himself with the Democratic party and encouraged other Northern Democrats to join him in opposition to its domination by southern Democrats. Unsuccessful in his efforts, he broke with the party over the Kansas-Nebraska Act.

Putting together a coalition of Free Soilers, anti-slavery Democrats, Whigs, and Know Nothings, he was elected governor of Ohio in 1855 and was reelected in 1857. As the nation’s first Republican governor he had helped organize the Republican Party. The Ohio legislature elected him to his second term in the U.S. Senate in 1860. In the meantime, he pursued his ambition to become the Republican nominee for the Presidency, falling short to Abraham Lincoln, as did William H. Seward and others. Although Chase was unsuccessful in his bid for the nomination, he stumped for Lincoln’s election. For his efforts, and because of his stature, Chase believed he ought to be Lincoln’s Secretary of State.3

Lincoln, however, had other ideas. He asked Seward to become Secretary of State. Lincoln offered Chase the Treasury Department. Chase at first indicated that he not only had no inclination to accept the position, recognizing that he lacked the financial expertise needed for the position. Still Lincoln insisted that he needed Chase in the Cabinet as Secretary of the Treasury. Chase insisted that he would rather remain in the Senate. Despite Chase’s reluctance, and without a definite acceptance, Lincoln sent his name to the Senate where he was immediately confirmed. Chase’s immediate reaction was to decline, but he reluctantly accepted and became one of the “team of rivals” in Lincoln’s cabinet.4

Although Chase protested that he lacked the background for the position, both he and Lincoln realized the Ohioan was better prepared than he had acknowledged. As governor of Ohio, he had prepared budgets for the state. Moreover, he had been a successful lawyer for banking interests over the years. Still, his problem was enormous. Not only had the nation not recovered from the Panic of 1857, eleven states were, or soon would be, out of the union. Following the firing on Fort Sumter, Lincoln issued a call for 75,000 militia for 90 days, and Congress would soon authorize the enlistment of thousands more. These soldiers and sailors not only had to be paid, but they had to be equipped, clothed, housed, fed, and transported. Soon thousands would need to be cared for in hospitals. Eventually, more than 2,750,000 men (including nearly 180,000

African Americans) would join the 16,000 soldiers and sailors in the armed forces on April 13, 1861.  

John Sherman summed it up in his *Recollections* by noting that “Secretary Chase . . . submitted to Congress, on the first day of the session, a clear statement of the financial condition of the United States.” Chase had projected a need for nearly $320 million for the next fiscal year, but that the receipts from all taxes would fall far short of that amount, necessitating a reliance on long-term bonds and treasury notes bearing interest on demand. Sherman remembered that the task could only be considered “Herculean.”

There were several reasons why the task would be “Herculean.” Not only was the amount that needed to be raised immense, but the National Subtreasury Law of 1836, and Chase’s own predilection for using only hard money, made a solution traditionally used by nations at war, the printing of paper currency based only on the credit of the nation, out of the question so far as he was concerned. Chase believed that the extraordinary expenses created by war should be covered by loans, with taxation covering only the ordinary expenses of government. Thus, the current generation need not bear the entire cost of a conflict that, if successful, would redound to the benefit of succeeding generations. Those subsequent generations, then, ought to share in the expense. Furthermore, he believed that with the resumption of peace, governmental income would naturally increase.

Chase then set about attempting to secure loans under the provisions of a loan act passed by the House and Senate and approved by the President on July 17, 1861. The bill authorized the Secretary of the Treasury to issue bonds and treasury notes up to $25,000,000. Twenty-year bonds were to bear an interest of 3 percent or less. Treasury notes issued in amounts above fifty dollars were to pay an interest of 7.3 percent (or one cent per day) semiannually and were to come due in three years. Notes issued in amounts less than $50 were not to pay interest and could be redeemed for coin on demand. These notes could be used to pay salaries or other governmental bills, or they could be obtained in exchange for coin. These were, in John Sherman’s words, “The first feeble attempt to create a national currency . . . .” Congress also responded to Chase’s request for increased taxation by passing modest increases to the Morrill Tariff adopted by...
the previous Congress. In addition, Congress introduced a $20 million direct tax, also a Chase proposal. When some members of Congress objected that the tax could not be collected in the rebellious states, Chase responded that a rebellion did not raise constitutional questions. When they were brought back into the union, they would still have to pay their portion of the direct tax. Congress, after much wrangling, also introduced the nation’s first income tax, but deferred its collection until 1862 on incomes earned in 1861.9

President Lincoln’s preoccupation with political and military issues, coupled with the overwhelming burden of patronage, had thus far apparently silenced his public pronouncements on matters relating to the economy. As a Whig, he had definite ideas on the economy. He defended governmental activism in the economy as had been demonstrated by his support of the Bank of the U.S. and the ill-conceived internal improvement ventures in Illinois. He had been a vocal champion of Henry Clay’s American System. His appointments to various economic, agricultural, and other sensitive economic positions illustrated his support of particular economic matters. But, by allowing Chase and Congress to grapple with the problems, he avoided criticism in these divisive matters.10

By the time Congress met in December 1861, however, Lincoln could no longer ignore the U.S.’s financial condition, which John Sherman described as “more alarming than at any other period during the war.”11 Pursuant to congressional authorization, Chase had negotiated substantial loans from the banks in the nation’s financial centers–New York, Philadelphia, and Boston. But those loans had been made in specie–gold and silver–and now, the banks’ vaults were bare. Because Chase insisted on receiving the funds in bullion and coins, and because he insisted on making payments in the same manner, most of the metal was scattered across the country, and little of it had been returned to the banks in the financial centers.

In addition, the demand notes—“the first feeble attempt to create a national currency”—that had been used to pay governmental salaries and other obligations, had been returned to treasury offices for specie, thus reducing the possibility of specie finding its way back to the nation’s financial centers.12

Actually, Congress had given Chase the option of leaving the specie with the banks and simply using drafts to pay the bills of the government. Chase, however, had chosen for some reason not to utilize this method, or failed to understand that he did not have to withdraw the gold. The upshot was, as

12. Ibid., 258-259.
mentioned above, that specie became scarce and finally, by the end of December 1861, banks across the nation suspending paying out specie.13

During the first year of the war, prior to the meeting of Congress in December 1861, Chase had managed to borrow $150 million from the banks in the three cities of New York, Boston and Philadelphia. He had also secured some $50 million from individual subscribers throughout the nation who had purchased the 7-30 notes in denominations ranging from $50 to $5,000 dollars. These 7-30 notes were for a three-year duration and paid one cent per day per $50 investment. The purpose for these notes, as he had asserted in his “Appeal to the Loyal People” was “to afford to all citizens equal opportunities of participation in these advantages . . . .” Their support in this way would ensure “Union, popular Government, permanent peace, security of home, [and] respect abroad; all imperiled by unprovoked rebellion.”14 Indeed, the loans accomplished their purposes, not only in raising money, but in many ways creating a connection between the national government and individuals in new ways.15

While the various loans had kept the treasury afloat, the nation needed currency to replace the specie that was no longer available. In his report to Congress on December 3, Lincoln commended the Secretary of the Treasury for its “signal success. The patriotism of the people has placed at the disposal of the government the large means demanded by the public exigencies. Much of the national loan has been taken by citizens of the industrial classes,” he observed, “whose confidence in their country’s faith, and zeal for their country’s deliverance from present peril, have induced them to contribute to the support of the government. . . .” He then noted with satisfaction that “the expenditures made necessary by the rebellion are not beyond the resources of the loyal people. . . .”16

Chase’s report, submitted December 9, reviewed the efforts to raise the money needed to fund the extraordinary expense of the government’s normal operations and to suppress the rebellion. He noted that despite his success in obtaining enormous loans, the expenses connected with raising and equipping the greatly increased military establishment while taxes and tariffs had declined, meant that additional funds were still needed. He recommended that duties on luxuries such as “tea, coffee, and sugar be increased” and that Congress find additional sources of revenue. He noted that while Congress had levied a direct tax of $20 million on the states, the citizens of those states in “open rebellion”

15. Richardson, Greatest Nation, 43-44.
had repudiated their share—$5,153,982. In view of that repudiation, he recommended that the property of those in rebellion be seized and sold to support the federal government. Of course that could not happen until the rebellion was suppressed.

In addition, he recommended that Congress levy personal property taxes. He noted that he was unable to estimate the amount of money that would be raised by the income tax, which would not be received until the following year, but recommended that in place of creating an additional bureaucracy that the states collect the tax and forward it to the treasury. Still, he noted, “It will be seen at a glance that the amount to be derived from taxation forms but a small portion of the sums required for the expenses of the war. For the rest, the reliance must be placed on loans.”

The cost of borrowing, however, was going to be much more expensive than the government would be comfortable with. “To enable the government to obtain the necessary means for prosecuting the war to a successful issue, without unnecessary cost,” Chase observed, “is a problem which must engage the most careful attention of the legislature.” With those words, Chase launched into a discussion of how the nation might secure necessary funds at little expense. He began by discussing state bank note circulation in the United States. It amounted, he said to $202,000,767, on January 1, 1861. “Of this circulation,” he wrote, “$150,000,000, in round numbers, was in States now loyal, including West Virginia, and $50,000,000 in the rebellious States.” This, he said “constitutes a loan without interest from the people to the banks, costing them nothing except the expense of issue and redemption and the interest of the specie kept on hand for the latter purpose. . . .”

Although in his judgement, and that of many others, Chase observed, “the most eminent statesman [question] whether a currency of bank notes issued by local institutions under State laws, is not, in fact, prohibited by the national Constitution. Such emissions,” he observed, “certainly fall within the spirit, if not within the letter, of the constitutional prohibition of the emission of bills of credit by the States, and of the making by them of anything except gold and silver coin a legal tender in payment of debts.” There were, Chase noted, “some sixteen hundred private institutions,” under the authority of 34 different states, supplying currency. Moreover, he observed, “It is usually furnished in greatest proportions by institutions of least actual capital. . . . Under such a system, or rather lack of system, great fluctuations, and heavy losses in discounts and exchanges, are inevitable; and not infrequently, through failures of the issuing institutions, considerable portions of the circulation become suddenly worthless in the hands of the people.”

Chase believed the solution to these problems was for the federal government to assume its constitutional powers to issue “United States notes,
payable in coin on demand, in amounts sufficient for the useful ends of a representative currency.” This currency would be printed by the federal government and issued by banks under the supervision and authority of the government. Such currency would be redeemable in coin on demand. At the same time, he suggested that a tax be levied on the circulation of non-federal currency, thus gradually forcing it out of circulation. The new federal currency, he wrote, was “equivalent to a loan to the government without interest…” In order to assure its safety, Chase would have the currency backed by the deposit of national bonds with the treasury. He noted that his plan was based on similar successful state plans around the nation.18

Between the time Chase issued his report and the end of December 1861, the New York, Philadelphia, and Boston banks along with the Treasury Department suspended specie payments. And in the meantime, the Trent affair had derailed slight hopes that European bankers might purchase government bonds. In response to Chase’s report, and the recommendation for a national currency to be issued by banks, Congressman Elbridge Spaulding, Chairman of a subcommittee of the House Committee of Ways and Means, asked the Secretary for a draft bill that outlined in detail his plans. When informed that Chase had no draft, Spaulding prepared a draft with assistance of others on the committee. The idea for such currency was not new. In fact, “as early as 1848, Millard Fillmore, then Comptroller of the Currency in New York, had suggested the idea.” The Bankers’ Magazine and Statistical Register in December 1861, had articles dealing with the currency and banking problems of the nation, including one by a New York Banker, L Bonnefoux, who advocated a national banking system.19

The first draft Spaulding and the members of his subcommittee drafted was based on Chase’s recommendation for national bank currency. Before the bill could be introduced, however, the nation’s finances were on the brink of total disarray. Spaulding then, with the primary assistance of Samuel Hooper, rewrote the bill, dropping out the proposal to have the currency backed by government bonds deposited with the Treasury. On the same day that the New York Banks announced the suspension of specie, shortly before 1:00 p.m., Spaulding introduced the bill authorizing the issuing of Treasury notes. It was read and referred to committee.20 Unlike the bill that Chase had recommended, however, this bill would authorize the Secretary to pay government bills with non-interest notes backed by nothing but the good faith and credit of the government. By and large easterners opposed the new bill, while westerners were more disposed to accept it. It was in the West where state bank currency was most volatile and the least reliable so Western citizens tended to favor the new notes. When the bill,

18. Ibid., 17-19.
20. Congressional Globe, 37 Cong., 2 sess (December 30, 1861), 181.
labeled House Bill 240, was reported back from committee on January 22, Chase was unhappy with the changes, primarily the clause making the notes “legal tender.” He had learned earlier in the month that the subcommittee had inserted a legal tender clause in the bill and had unsuccessfully tried to block it. Owing to the urgency of the matter, however, Chase acquiesced, noting in his letter to the subcommittee dated January 29, 1862:

The provision making United States notes a legal tender has doubtless been well considered by the committee, and their conclusion needs no support from any observation of mine. I think it my duty, however, to say, that in respect to this provision my reflections have conducted me to the same conclusions they have reached. It is not unknown to them that I have felt, nor do I wish to conceal that I now feel a great aversion to making anything but coin a legal tender in payment of debts. It has been my anxious wish to avoid the necessity of such legislation. It is, however, at present impossible, in consequence of the large expenditures entailed by the war, and the suspension of banks to procure sufficient coin for disbursements; and it has therefore become indispensably necessary that we should resort to the issue of United States notes.

In a private letter to Spaulding, dated February 4, 1862, Chase continued “I came with reluctance to the conclusion that the legal-tender clause is a necessity; but I came to it decidedly and support it earnestly. I do not hesitate since I have made up my mind.” That same day he wrote to William Cullen Bryant, editor of the New York Evening Post, insisting that he yielded on the matter, despite his “repugnance to the legal tender clause” because a minority of influential business people, who controlled the majority, would not accept the notes unless made legal tender.21

Although Chase acquiesced in making the notes legal tender, subsequently labeled “greenbacks,” he was never comfortable with it. The bill also encountered considerable difficulty in the Senate; Senators William Pitt Fessenden of Maine and Jacob Collamer of Vermont particularly unhappy with it. Collamer believed the legal tender provisions were unconstitutional. Senators Henry Wilson and John Sherman, on the other hand, supported the bill. Sherman helped turn the tide in the Senate when he advised the Senators that bankers would be reluctant to accept the notes unless they were made legal tender. Despite the basic unhappiness of both houses, the bill eventually passed and was signed into law by President Lincoln on February 25, 1861. The act

21. Chase to Thaddeus Stevens, Treasury Department, January 29, 1861, Niven, Chase Papers, 3:126; Chase to Spaulding, February 4, 1861, extracts from both the Stevens and Spaulding letters are printed in Congressional Globe, 37 Cong., 2 sess., 618; Chase to William Cullen Bryant, Treasury Department, February 4, 1862, Niven, Chase Papers, 3:129-30.
authorized the Secretary to issue up to $100 million in treasury notes. By midsummer, the cupboard was again bare and Chase requested that Congress authorize another $150 million, which it did.

Although now saddled with legal tenders, neither Chase nor Lincoln were comfortable with them. They both believed that the nation’s monetary system needed a more permanent, and they hoped, a more stable national currency. Both still wished to see state currency eliminated from the monetary system. To that end, Chase suggested to Fessenden on June 30, 1862 that while the Senate was considering the authorization of additional Greenbacks, they also impose a tax on state bank notes. “This is the only species of property,” he wrote, “which under the existing state of suspension costs the proprietors nothing or very little, which is exempt from taxation. The great increase of this circulation in my judgment is the true cause of the general depreciation of currency, marked by the apparent rise of gold.” A few days later Senator Sherman proposed a state bank note tax. Such a tax would eliminate state bank note competition with federal currency and finally give the national government control over its currency. After a thorough discussion, it was defeated. New England senators particularly objected because their states already had a small tax on state bank circulation.

Chase continued to grapple with raising funds to support the Union war effort. Both the passage of the Legal Tender Act and the taxes imposed by Congress, as historian James McPherson wrote

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22. The best discussion of the tortuous route of the Legal Tender bill through Congress has been provided by Heather Cox Richardson. See her Greatest Nation, 70-82. For a much more critical discussion of the passage of the bill see Hammond’s Sovereignty and an Empty Purse, 159–162.

23. Richardson, Greatest Nation, 82-83. As late as March 21, 1864, Chase was defending his support of legal tenders despite his distaste for them. “The banks of New York suspended on the 30th December 1861, and their example was followed throughout the country. This suspension made it certain that the Government could no longer obtain coin on loans in any adequate amounts: some of the banks indeed which had subscribed to the seven per cent. loan declined to pay their subscriptions in coin, and even asked to be relieved from payment in notes of the United States. Under these circumstances I had no choice but to suspend payment of these notes in coin, and take measures to provide a currency in which loans could be negotiated and the transactions of the Government carried on. I wished to avoid the necessity of making notes of any kind a legal tender; and proposed several modes of doing it. To none could the unanimous assent of the banks be obtained. Some of them manifested a disposition to discredit the National Circulation wholly, whether issued in notes bearing interest or issued in notes bearing no interest; and if possible force upon the country the circulation of the suspended banks. Several bankers refused to receive the United States Notes on deposit. This way of things was the high road to ruin; and I did not hesitate as to the remedy. I united at once with those who desired to have the United States Notes made a legal tender, and by joining them decided the success of that measure.” Salmon P. Chase to John T. Trowbridge, Treasury Department, Mar. 21, 1864, John Niven, et al., The Salmon P. Chase Papers, Kent, Ohio: The Kent State University Press, c.1966, 4:349-350.

24. Chase to Fessenden, June 30, 1862, Niven, Chase Papers, 3:225-226; Richardson, Greatest Nation, 82-83. Chase had recommended the same tax on state bank currency in his December 1861 Report, 18. See also, Sherman, Recollections, I, 283. For the Senate discussion on Sherman’s amendment, see Cong. Globe, 37 Cong., 2 sess., 3071-3079 (July 2, 1862)
taxed almost everything but the air northerners breathed. It imposed sin
taxes on liquor, tobacco, and playing cards, luxury taxes on carriages,
yachts, billiard tables, jewelry, and other expensive items; taxes on
patent medicines and newspaper advertisements, license taxes on almost
every conceivable profession or service except the clergy, stamp taxes,
taxes on the gross receipts of corporations, banks, insurance companies,
and a tax on the dividends or interest they paid to investors; value-
added taxes on manufactured goods and processed meats; an
inheritance tax; and an income tax.  

While Congress continued to increase taxes and borrow money, the
President, Chase, and some members of Congress, reacting in part to the
centrifugal force of state rights, encouraged steps to foster a sense of nationalism
and loyalty to the Union. That had been one of the reasons Chase had
encouraged selling bonds at a price of $50 so that they could be purchased by
ordinary citizens. This fostered not only a feeling patriotism but tied people to
the central government in ways they had not been tied before. The same was
true for the imposition of the first income tax in American history. Another step
in this direction had been the issuance of the Legal Tenders (referred to as
Greenbacks because of the color of the ink). But, while the Greenbacks had the
virtue of being a uniform national currency, and also provided, as it were, an
interest free loan to the government, Lincoln, Chase, and leading Senators and
Congressmen realized the danger that such printing press money would have if
the printing presses spun out of control.

In his first annual report to Congress, Chase had suggested the creation of
national bank based national currency. He repeated the call, with more urgency
in his 1862 annual report. By that time, the idea was no longer novel and
increasing numbers of people, especially financial people recognized both its
merits, and the danger the plan posed for the more than sixteen hundred state
banks that also issued currency, a currency that the federal government would
not accept in payment for taxes, loans, or anything else. But, as Chase, and
others, pointed out the state bank printed currency served as interest free loans to
those banks, who in turn loaned money deposited with them, earning substantial
interest therefrom.

When, in July 1862, Congress was forced to approve another $300,000,000
in Greenbacks in order to meet its financial obligations, Lincoln warned that he
would veto any additional issue of currency. Meanwhile, ever since he had first
suggested the creation of a national currency through a system of national banks,
Chase had encouraged Jay Cooke, and his brother, H. D. Cooke to support the
plan. In 1862, Chase increased the pressure and the Cookes began preparing
newspaper features supporting the plan. Because the Cookes were so successful

at marketing the low denomination federal notes or bonds, by advertising in papers throughout the North, those papers willingly printed the propaganda.

The basic outline, or model, for a system of national banks and national currency was the organization of the New York, and later, the Ohio state banking systems. In very broad outlines, banks deposited safe securities with the state and were then given permission to issue a limited amount of currency, based on the value of those securities. The banks themselves then printed the currency, resulting in a wide variety of bills with all kinds of interesting and novel designs. But, because of the variety of bills, it was relatively easy to pass fake money. The result was that in many parts of the nation, currency was only good in the locale where the bank was situated. And, of course, the very local nature of this type of bank currency ran counter to any sense of nationalism or loyalty to a distant central government.  

Although Lincoln did not say much publicly about money during the Civil War, he had supported Chase’s efforts. In his annual message of 1862, Lincoln gave considerable attention to the nation’s finances. He endorsed the action by Congress and Chase in creating the Greenbacks, writing “The judicious legislation of Congress, securing the receivability of these notes for loans and internal duties, and making them a legal tender for other debts, had made them an universal currency; and has satisfied, partially, at least, and for the time, the long felt want of an uniform circulating medium, saving thereby to the people, immense sums in discounts and exchanges.” At the same time, however, he expressed the desire to return to specie as the medium of exchange. But, aware that a return to specie was unlikely in the near future, he asked whether there was another solution to the monetary problems facing the nation. He asked

Is there then, any other mode in which the necessary provision for the public wants can be made, and the great advantages of a safe and uniform currency secured? I know of none which promises so certain results, and is at the same time, so unobjectionable, as the organization of banking associations, under a general act of Congress, well guarded in its provisions. To such associations the government might furnish circulating notes, on the security of United States bonds deposited in the treasury. These notes, prepared under the supervision of proper officers, being uniform in appearance and security, and convertible always into coin, would at once protect labor against the evils of a vicious currency, and facilitate commerce by cheap and safe exchanges.  

Lincoln and Chase recognized that the creation of a national currency would probably have little impact on the ability of the nation to raise additional money for the war effort, but they believed it would benefit the nation in the long run. Chase made a much more elaborate justification for the proposed national banking and currency system in his report. And he was clearly looking beyond the war and the reconstruction of the newly reunited nation. Furthermore, he assured Congressmen and Senators that while

The Secretary forbears extended argument on the constitutionality of the suggested system. It is proposed as an auxiliary to the power to borrow money; as an agency of the power to collect and disburse taxes; and as an exercise of the power to regulate commerce, and of the power to regulate the value of coin. Of the two first sources of power nothing need be said. The argument relating to them was long since exhausted and is well known. Of the other two there is not room nor does it seem needful to say much. If Congress can prescribe the structure, equipment, and management of vessels to navigate rivers flowing between or through different States as a regulation of commerce, Congress may assuredly determine what currency shall be employed in the interchange of their commodities, which is the very essence of commerce. Statesmen who have agreed in little else have concurred in the opinion that the power to regulate coin is, in substance and effect, a power to regulate currency, and that the framers of the Constitution so intended. It may well enough be admitted that while Congress confines its regulation to weight, fineness, shape, and device, banks and individuals may issue notes for currency in competition with coin. But it is difficult to conceive by what process of logic the unquestioned power to regulate coin can be separated from the power to maintain or restore its circulation, by excluding from currency all private or corporate substitutes which affect its value, whenever Congress shall see fit to exercise that power for that purpose.28

By most accounts, the individuals primarily responsible for pushing through the National Currency Act (H.B 240) were Chase, Lincoln, John Sherman, and Jay Cooke. Sherman had long been antagonistic toward the system of state banks and state bank currency. Early in life, he became convinced “the whole system of state banks . . . was both unconstitutional and inexpedient and that it ought to be overthrown.” It seems to have taken little effort for Chase and Cooke to persuade Sherman to introduce the bill as a substitute for the one sent over from the House. He observed in an undated letter to his wife, probably in late February,

Chase appealed to me through Cooke to remodel the bill to satisfy my views and take charge of it in the Senate. The appeal was of such a

character that I could not resist, although I foresaw the difficulties and danger of defeat. When I made the speech on taxation of state bank bills, I had not determined what to do, but carefully avoided any reference to the National Bank Bill. That speech brought me into correspondence with bankers and others, and while giving me some reputation, compelled me to study the preference between government and bank currency and led me to the conviction that it was a public duty to risk a defeat on the Bank Bill. I thoroughly convinced myself, if I could not convince others, that it was indispensable to create a demand for our bonds, and the best way was to make them the basis of a banking system. When you reflect upon the magnitude of interests involved you will be impressed what a task this was. Not a step could be taken without a contest with local banks of great power and extensive ramifications. However, I carefully examined Chase’s bill, made several important alterations and restrictions and introduced it...

. During the struggle I was very anxious, and scarcely slept, and now feel all the lassitude consequent on a long mental effort.29

The bill called for private banks to be organized under a federal charter. As few as five people could organize a national bank if the enterprise had $50,000 in capital stock. These institutions would deposit government bonds with a new officer in the Treasury Department, a comptroller of the currency. The comptroller would then prepare government-imprinted banknotes that would be issued by the bank with its own name on the currency. The currency issued would be distributed on a formula allocating $150 million according to the population of each state and territory and another $150 million based on each states portion of the national economy.30

Although the policy of imposing a federal monetary system was appealing to Sherman, Treasury Secretary Chase, Lincoln, and a few Republican senators, many prominent Americans were not so sanguine. Used to the freedom allowed by state laws, Western bankers did not want to be forced to reform their practices. Those states with sound banking practices, such as New York and Ohio, were also opposed to the new system because the proposed currency would compete with their own already well-established and profitable practices. Greenback supporter Thaddeus Stevens opposed and blocked a similar bank bill in the House for months; he considered it a device of money monopolists and was disappointed at the general lack of federal regulations. Hugh McCulloch, later comptroller of the currency and secretary of the treasury, lobbied against the currency bill on behalf of the State Bank of Indiana. Thus, opposition to the bill was varied and formidable.


30. See Richardson, Greatest Nation, 84-86, for fuller details on the organization of the banks.
When the Senate began consideration of the national currency bill, Sherman presented a vigorous defense of the measure. The question at issue, he said, was not so much whether the Federal government had the right to establish national banks and give them the privilege of issuing a uniform currency but whether it was expedient and safe to put so much power in Washington’s hands. Sherman insisted it was.

Additionally, the Ohio senator believed there were other, more important reasons for adopting the measure. In good Hamiltonian fashion, he argued that the national currency bill would create “a community of interest between the stockholders of banks, the people, and the Government.” If national banks had been established throughout the country as agents of the government, he added, “they would have done very much indeed to maintain the Federal Government and to prevent the crime of secession.” There was, however, a still more important reason to support the bill (and here Sherman broke with many of his more conservative friends):

It will promote a sentiment of nationality. There can be no doubt of it. The policy of this country ought to be to make everything national as far as possible; to nationalize our country, so that we shall love our country. If we are Dependent on the United States for a currency and a medium of exchange, we shall have a broader and a more generous nationality. The want of such nationality, I believe, is one of the great evils of the times. This doctrine of State rights, which substitutes a local community—for, after all, the most powerful State is but a local community—instead of the United States of America, has been the evil of the times; and it has been that principle of State rights, that bad sentiment that has elevated State authority above the great national authority, that has been the main instrument by which our Government is sought to be overthrown.

The establishment of a national currency, Sherman declared, was the most important measure before Congress. Concerning the national currency bill, he stated unequivocally:

It is more important than the loss of a battle. In comparison with this, the fate of three million negroes held as slaves in the Southern States is utterly insignificant. I would see them slaves for life as their fathers were before them, if only we could maintain our nationality. I would see them free, disenthralled, enfranchised, on their way to the country from which they came, or settled in our own land in a climate to which they are adapted, or transported anywhere else, rather than to see our nationality overthrown. I regard all those questions as entirely subordinate to this. Sir, we cannot maintain our nationality unless we
establish a sound and stable financial system; and as the basis of it we must have a uniform national currency.\textsuperscript{31}

The bill narrowly passed by a vote of twenty-three to twenty-one. Later, Sherman wrote that it was only after he and Chase had a private discussion with Senator Henry Brown Anthony of Rhode Island, stressing the national importance of the measure, that the senator agreed to forget local interests and support the bill.

Although the House approved the national currency bill with little discussion, it apparently required Lincoln’s additional intervention. Consequently, William O. Stoddard, one of Lincoln’s private secretaries, wrote that in addition to his communications with Congress in his annual message and his even stronger message to Congress on January 17, 1863, “Mr. Lincoln’s favorite, of all the financial schemes pushed to conclusion by this Congress [the 37\textsuperscript{th} Congress], was the National Bank Act.”\textsuperscript{32} On February 19, while the House was deciding whether to accept the revised bill, Chase sent a note to Lincoln asking him to use his influence to get Illinois Republican Congressman William Kellogg to support the bill.\textsuperscript{33} Even so, it is doubtful that the bill would have been passed at that particular time had it not been for the exigencies created by the Civil War.

Before Sherman introduced the substitute banking bill, he had introduced a bill to tax state bank issued currency as Chase had requested. Sherman dropped the effort for a high tax on state bank circulation when it was clear that local interests had influenced their congressmen and that the congressmen would not permit such a high tax. At the same time, a very light tax was imposed on the circulation of both state and national banks.\textsuperscript{34} A state tax of 10 percent on state issued currency was finally enacted in on March 3, 1865, to take effect in 1866.\textsuperscript{35}

Congress replaced the National Currency Act of 1863, with a new act, approved June 5, 1864. Nationally chartered federal banks had the reserve requirements for issuing currency reduced. Whereas the act of 1863 had required that banks organized under it were required to be called by number in the order they received their charter, the new act allowed the new banks to keep their original names. It also dropped the requirement that half of the currency be

\textsuperscript{31} Congressional Globe, 37th Cong., 3d sess., 820-26 (February 9, 1863), 840-46 (February 10, 1863); the speeches are also in Sherman, Selected Speeches, 51-79.


\textsuperscript{33} “It is said that Kellogg of Illinois is disinclined to vote for the Banking bill and that you can probably secure his vote. The bill is before the House tonight and the vote will probably be taken soon after noon tomorrow. Will you send for Kellogg meanwhile & saying nothing of this note, urge him to support the bill on your account, & to support it earnestly?” Salmon P. Chase to Abraham Lincoln, Washington, DC, Feb. 19, 1863, Chase Papers, 3:388.

\textsuperscript{34} John Sherman to Chase, Feb. 7, 1863, Chase Papers, 3:379.

\textsuperscript{35} Charles N. Emerson, Emerson’s Internal Revenue Guide, 1867 . . . (Springfield, Mass.: Samuel Bowles & Co., 1867), 175-176.
distributed by population. In 1863, 66 national banks were organized under the original act. The following year there were 467 banks, 1,294 banks in 1865, and 1,636 banks in 1866. The growth of national banks slowed significantly after that. During that same four-year period, the number of state banks declined significantly from 1,466 in 1863 to 297 in 1866. Chase had worked extremely hard to get this revised bill passed. A letter to Sidney George Fisher may best encapsulate his desire for a revision of the 1863 National Currency Act. He wrote:

To me no truth is more clear than that the fiduciary currency of every country must be under the direct control of the National Government, and that without such control unity of operation and uniformity of value cannot be secured. I am no believer in irredeemable paper money. The National Banking System will be a failure unless the National Currency is made the just equivalent of gold and silver. To bring about this equilibrium is my earnest desire, and my labors will fail of one of their great objects if I do not attain it — To its attainment I feel that legislation imposing taxes at least equal to one-half of the National Expenditure and excluding the circulation of local currency of every description other than National Currency, is indispensable.

In a letter to John Sherman, while the revision of the act was in conference committee, Chase urged the Senator to push for a tax on state banks, while excluding national banks. It was necessary, he said to prevent the inflation that was resulting from state banks using greenbacks and national bank notes as security to issue more state bank currency.

Chase’s connection with war financing, banking and currency changed abruptly when he resigned as Secretary of the Treasury over patronage matters in New York. Owing to ill-health, John J. Cisco who had served as Assistant Secretary of the Treasury in New York, had resigned. Lincoln had set about replacing Cisco without consulting Chase. While Lincoln was consulting leading political figures in New York for a Cisco’s replacement, Chase sent Lincoln a note nominating Maunsell B. Field. Lincoln replied “I can not without much embarrassment, make this appointment, principally because of Senator Morgan’s very firm opposition to it.” Chagrined at Lincoln’s quick reply and the nature of it, Chase responded: “I have just received your note . . . . I was not aware of the extent of the embarrassment to which you refer.” Chase continued, “I think it my duty therefore to enclose to you my resignation. I shall regard it as a real relief if you think proper to accept it. . . .” Perhaps, contrary to what

37. Chase to Fisher, April 8, 1864,Niven, Chase Papers, 4:368.
Chase expected, Lincoln replied: “Your resignation of the office of Secretary of the Treasury, sent me yesterday, is accepted. Of all I have said in commendation of your ability and fidelity, I have nothing to unsay; and yet you and I have reached a point of mutual embarrassment in our official relation which it seems can not be overcome, or longer sustained, consistently with the public service.”

The same day Lincoln accepted Chase’s resignation, Chase advised William Cullen Bryant of his resignation. But he could not resist recounting some of his successes.

My grand objects have been first to provide for the demands of the War; and second to secure the substitution of a national bank note currency for state bank note currency, and through the last resumption of specie payments, and so permanence & strength in financial order . . . If I feel some regret that I cannot carry out my ideas to consummation, it is compensated by the sense of relief from crushing responsibilities.

But his “relief from crushing responsibilities” did not last long. Despite his abrupt resignation, and his abortive campaign for the Republican nomination for the Presidency while still in the Cabinet, Chase campaigned for Lincoln that fall. In no small part, his cordial support of Lincoln was linked to the expected imminent death of Chief Justice Roger B. Taney. When Taney finally died October 12, 1864, Chase hoped that he would replace the author of the Dred Scott Decision. And he had reason to believe that he would be nominated for the position. His friends, such as John Sherman, let Lincoln know of their support for Chase. Furthermore, Lincoln, with the Civil War coming to a close, knew that many issues growing out of the war were likely to come before the Court and he believed that Chase could be counted on, not only to support emancipation, but the monetary matters that might come before the court.

Lincoln, however, delayed making an appointment until after his election and the opening of the next session of Congress. Chase finally learned of his nomination on December 6, 1864, and following confirmation, was sworn in as Chief Justice of the United States nine days later.

Of all of his actions as Secretary of the Treasury, only two of his actions came before him as Chief Justice. The two matters that came to the Court dealt with the National Currency or National Banking Act, and the other dealing with the Legal Tender Acts. Given the facts in both cases, it was widely believed that Chase would uphold the provisions of the laws that were being challenged.

The first of the two cases was *Veazie Bank v. Fenno*. The Veazie Bank in Maine had declined to pay the ten percent tax levied under the 1865 amendment to the National Banking Act of 1864. The bank claimed that the act violated the
Constitution in being a direct tax that Congress lacked the power to impose on a “franchise granted by the State.” Writing for the majority, Chase said Congress had the power to provide a uniform currency for the nation, and protect it from unfair competition by state banks. He wrote that

> It cannot be doubted that under the Constitution the power to provide a circulation of coin is given to Congress. And it is settled by the uniform practice of the government and by repeated decision, that Congress may, constitutionally authorize the emission of bills of credit. . . . [and] Congress may restrain, by suitable enactments, the circulation as money of any notes not issued under its own authority. Without this power, indeed, its attempts to secure a sound and uniform currency for the country must be futile.42

The second case was far more controversial. The question at issue was whether a contract written prior to the passage of the Legal Tender Act of February 25, 1862, could be satisfied by Greenbacks. The case came out of Kentucky and involved a promissory note between a Mrs. Susan Hepburn and Henry A. Griswold. The loan was contracted in 1860 and came due in 1862. By the time the note came due, the Legal Tender Act had become law. Mrs. Hepburn offered to pay Griswold in Greenbacks. He refused because at that point Greenbacks had depreciated in relation to their value in gold or silver. Indeed, Greenbacks were worth about fifty cents per gold or silver dollar, so Griswold refused payment and sued.

Because of Chase’s involvement in the Legal Tender Act, and because he had averred that Greenbacks were necessary for the prosecution of the Civil War, most people believed he would uphold the law. Indeed, on May 18, 1864, Chase had written to an Ohio friend “I do not agree with you in thinking that the Constitution prohibits the issue of legal tender notes under [the aut]hority of Congress: but I do concur in the opinion [that] an inflated paper currency is a great evil & should be reformed as soon as possible.”43 It was not so certain, however, how others on the court would view the matter. Chase had never hidden his distaste for the necessity of legal tenders, indeed that was one of the reasons he had pushed so hard for the National Currency Act of 1863 and its successors. But, as he had said on many occasions, Congress had left him no alternative. He had hoped, however that the National Currency would be the occasion for the gradual withdrawal of Greenbacks. He charged that Congress had defeated that hope by issuing another $300,000,000 in legal tender after the


passage of the National Currency Act. Writing for the majority, Chase found the Legal Tender Acts unconstitutional. Basically, he ruled that the Constitution did not permit, under its power to coin money, to make paper substitute money. Moreover, because the contract had been made prior to the passage of the act, Griswold was deprived of his property by being paid in depreciated currency. This decision was later overturned, with Chase still on the court, but this time found with those who dissented.

The National Banking Act of 1863, with numerous revisions and amendments remained the basic monetary law in the United States until the Federal Reserve Act of 1913. Even so, the basic premise of a thoroughly national monetary system under national control remained intact.

While many see the economic and monetary efforts during the Civil War as resurgent Hamiltonian economics, I would suggest that there was something else at work. Republican leaders in their economic policies and other matters were reacting to the basic states rights philosophy that had government American politics and government since Thomas Jefferson. Even when Southerners were asserting that the national government needed to enforce its law concerning slaves, slavery, and the Fugitive Slave Law, they were asserting that supremacy in defense of a local institution, not a national institution. They were saying that we do not respect a national government that does not protect our peculiar local interests and concerns.

The Republicans who controlled the nation after the withdrawal of Southern leaders, believed that the nation and its Republican experiment were more important than local interests. The best way, in their estimation, to create an ideal nation was to foster loyalty, to that nation and its ideal of providing opportunity for all, rather than fostering loyalty to one of a number of polyglot states.


THE TRIAL OF JEFFERSON DAVIS AND THE TREASON CONTROVERSY

Ian Mitchell

“The framers’ effort to compress into two sentences the law of one of the most intricate of crimes gives a superficial appearance of clarity and simplicity which proves illusory when it is put to practical application.”


“If he [Jefferson Davis] is guilty of anything he is guilty of treason, an offence defined by law, and for the punishment of which a certain mode of trial has been provided by the constitution.”—New York Times, May 23, 1865.

I. INTRODUCTION

American trials for treason have a tumultuous history. Since the inclusion of Article III, section three in the U.S. Constitution in 1789, lawmakers and courts alike have written varied opinions on treason and have struggled to interpret the only crime defined in our chief document of governance. Today, treasonable conduct very rarely, if ever, leads to an indictment for treason. During the Civil War-era, however, the United States brought several indictments under the Treason Clause for disloyal behavior, conduct amounting to existential threats against the government. Throughout these trials the courts attempted to reconcile the Constitutional crime of treason with the English

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4. United States v. Greathouse, 26 F. Cas. 18, 21 (C.C.N.D. Cal. 1863).
5. See Paul T. Crane, Did the Court Kill the Treason Charge?: Reassessing Cramer v. United States and Its Significance, 36 Fla. St. U. L. Rev. 635, 637 (2009) (notes that between 1954 to 2006 only one indictment for treason was issued by federal prosecutors).
6. United States v. Hanway, 26 F. Cas. 105 (C.C.E.D. Pa. 1851) (No. 15,299); United States v. Greiner, 26 F. Cas. 36 (E.D. Pa. 1861) (No. 15,262); Ex Parte Vallandigham, 28 F. Cas. 874 (C.C.S.D. Ohio 1863) (No. 16,816); United States v. Greathouse, 26 F. Cas. 18 (C.C.N.D. Cal. 1863) (No. 15,254); United States v. Cathcart, 25 F. Cas. 344 (C.C.S.D. Ohio 1864) (No. 14,756); Druecker v. Saloman, 21 Wis. 621 (Wis. 1867).
common law understanding of high treason, to which the American crime traces its roots.\footnote{7. Hurst, supra note 3, at 14-49.}

The Civil War-era cases culminated with the case of Jefferson Davis which was labeled the most important criminal trial of the age.\footnote{8. Cynthia Nicoletti, Did Secession Really Die at Appomattox?: The Strange Case of U.S. v. Jefferson Davis, 41 U. Tol. L. Rev. 587, 591 (2010) (citing N.Y. Herald, Oct. 28, 1865).} Davis was described as the “arch-traitor,”\footnote{9. Davis in Fortress Monroe, N.Y. Times, May 25, 1865, at 8, available at ProQuest Historical Newspapers The New York Times (1857-1922), Doc. ID 80303556.} and his prosecution for treason had the potential to determine, aside from his own complicity in the insurrection, the illegality of secession.\footnote{10. Nicoletti, supra note 8, at 588.} However, in addition to the possible political victory that could have been won by President Johnson’s administration through Davis’s conviction,\footnote{11. See generally C. Ellen Connally, The Use of the Fourteenth Amendment by Salmon P. Chase in the Trial of Jefferson Davis, 42 Akron L. Rev. 1165 (2009); William J. Cooper, Jr., Jefferson Davis, American 598, 601 (Jane Garret ed., 2000).} Chief Justice Salmon P. Chase presided over Davis’s trial and had a unique opportunity to resolve a controversy concerning the Constitution’s Treason Clause.\footnote{12. U.S. Const. art.III, § 3.} Would Confederate leaders be tried for treason, or did the war abrogate their personal allegiances to the United States? Chief Justice Chase believed that section three of the Fourteenth Amendment conferred a penalty on Davis for breach of allegiance, thus preventing him from double jeopardy under a treason conviction for the same crime.\footnote{13. The Case of (Jefferson) Davis, 7 F. Cas. 63, 102 (C.C.D. Va. 1867) (No. 3621a).} Although the question was certified to the Supreme Court, it was never reviewed and the treason charge was later dismissed.\footnote{14. Id.}

As a result of the dismissal, the U.S. Supreme Court would not have another opportunity to hear arguments on the substantive law of treason under the Constitution until the Cramer trial in 1945.\footnote{15. The Supreme Court did review a treason case, Ex Parte Bollman, 8 U.S. 75 (1807), as part of the Burr conspiracy, but the case was dismissed for lack of evidence. Justice Marshall’s opinion, discussed infra, provided guidance on the required elements of a treason conviction.} The Cramer majority’s holding suggested that Congress could outlaw specific acts exhibiting subversive intent under different laws, and circumvent the treason charge altogether, which in fact was more difficult to prosecute as a result of the Constitution’s evidentiary requirements.\footnote{16. See Crane, supra note 5, at 693.} These congressional acts would not be subject to the procedural protections of the Treason Clause, and they could replace treason indictments as the primary prosecutorial tool for addressing treasonable conduct.\footnote{17. See Crane, supra note 5, at 693.}
provide a means of understanding the purpose of the Treason Clause’s inclusion in the Constitution. A holding on this question could have provided much needed guidance for the justice department to prosecute subsequent types of conduct that fell under the proper description for treason. The absence of this precedent left treason susceptible to circumvention and precluded the Cramer trial, which all but advocated such a tactic.\(^{18}\) Ambiguities and inconsistencies in treason law persisted as evidenced by the cases of Ex Parte Quirin, United States v. Rosenberg, and Hamdi v. Rumsfeld.\(^{19}\)

Including Cramer, the Supreme Court has only reviewed the substantive law of treason in three cases to date, and therefore a well-developed, common-law understanding of what constitutes treason has been missing.\(^{20}\) Currently, an American citizen named Adam Gadahn is indicted in California for aiding Al-Qaeda in propaganda and dissemination of information, both of which provided comfort to enemies of the United States.\(^{21}\) It is unclear how courts will consider his case based on their recent reluctance to invoke the treason charge. The courts’ movement away from treason prosecutions has resulted in a general disorientation or lack of consensus as to how the historic concept of allegiance fits into our national identity.\(^{22}\)

22. See, e.g., Suzanne Kelly Babb, Fear and Loathing in America: Application of Treason Law in Times of National Crisis and the Case of John Walker Lindh, 54 HASTINGS L.J. 1721 (2003) (arguing that Taliban fighter John Walker Lindh should not have been tried for treason in spite of his adherence to a known enemy of the United States); Tom Bell, Treason, Technology, and Freedom of Expression, 37 ARIZ. ST. L.J. 999 (2005) (arguing that availability of treason indictments for adherence to the enemy, as currently understood, run the risk of “chilling” speech and expression guaranteed under the First Amendment); Kristen E. Eichensehr, Treason in the Age of Terrorism: An Explanation and Evaluation of Treason’s Return in Democratic States, 42 VAND. J. TRANSNAT’L L. 1443, 1489, 1506 (2009) (arguing that “treason is not antiliberal” and that continued focus on the duty of allegiance can “reinforce societal identity”); George P. Fletcher, Ambivalence About Treason, 82 N.C. L. REV. 1611 (2004) (arguing that future treason prosecutions are unlikely considering the pragmatic approach taken by federal prosecutors and the difficulty associated with bringing the charge in spite of treason’s continued utility to a general understanding of criminality); Henry Mark Holzer, Why Not Call It Treason?: From Korea to Afghanistan, 29 S.U. L. REV. 181 (2002) (arguing that failure to prosecute treasonable conduct under treason indictments is a “colossal mistake”); Douglas A. Kash, The United States v. Adam Gadahn: A Case for Treason, 37 CAP. U. L. REV. 1, 25 (2009) (arguing that in spite of concerns that the concept of treason conflicts with freedom of speech, it remains a “unique and critically important crime”); Carlton F.W. Larson, The Forgotten Constitutional Law of Treason and the Enemy Combatant Problem, 154 U. PA. L. REV. 863 (2006) (arguing that treason remains a relevant and necessary tool for prosecuting domestic terrorism); Benjamin A. Lewis, An Old Means to a Different End: The War on Terror, American Citizens . . . and the Treason Clause, 34 HOFSTRA
Part II of this paper will highlight the history of American treason cases and provide context for aspects of the treason charge that have been interpreted in American history. Significant emphasis is given to the concept of constructive levying of war, a major concern to the Framers of the Constitution when drafting the Treason Clause.23 The section begins with a discussion of the confusion among federal courts regarding the limitations of the Clause. Part II examines the history of the Davis trial in detail. It was as controversial in legal circles as it was pivotal in the political climate during its time. The strange direction that the trial took outside the courtroom ultimately led to a disinterest in the case by 1869, resulting in a lost opportunity to resolve discrepancies in substantive treason law.24 Finally, Part II discusses Ex Parte Quirin, the Cramer trial, and the effects these two cases had on the pursuit of treason charges in American courts. Although Cramer did not involve the levying of war issue that was relevant to the Davis trial, the restrictive definition adopted by the Court in Cramer had implications for all subsequent treason trials, including those that could have invoked a levying of war claim.

Part III concludes by examining the argument that the Treason Clause remains a vital tool for prosecuting individuals fighting against the United States in conflicts like the “War On Terror,” in spite of the government’s preferred alternative approaches. This section proposes that the Davis trial was in a unique position to preserve an understanding of permanent allegiance that could have been applied to modern cases of treasonable conduct. In addition to providing a deterrent function, the Treason Clause also provides an essential tool for individual liberty by preserving protections for individuals from government overreach, and it should not be ignored because of prosecutors’ pragmatic considerations.

II. HISTORICAL AND LEGAL DEVELOPMENTS OF THE TREASON CHARGE

Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. 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. The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.25

L. REV. 1215 (2006) (arguing that in spite of reliance on easier to prosecute alternatives to treason, like seditious conspiracy, treason remains a useful, yet untapped tool in the war on terror).


A. Pre- Civil War Cases

The Davis trial began in 1867, eighty years after the signing of the Constitution and seventy-eight years before United States v. Cramer, establishing itself as a meridian between the inception of the Treason Clause and the Supreme Court’s first examination of it. To appropriately evaluate the uniqueness of the Davis trial, it is necessary to consider the historical progression of previous treason prosecutions. The absence of accord regarding the use of the Treason Clause, and in particular the pervasiveness of the constructive treason doctrine regarding levying of war, both can be demonstrated by examining the cases during the period leading up to the Civil War.

Twenty years after the signing of the Constitution, the first case involving Article III, section 3 came before the Supreme Court. In 1807, Chief Justice Marshall’s Court dismissed the case of Ex Parte Bollman for lack of evidence. However, in the majority opinion’s dicta, Marshall discussed the elements of treason and laid out the substantive framework by which all subsequent treason cases could be brought. Primary among his observations was the inflexibility of the crime to new interpretations: “It is therefore more safe [sic] as well as more consonant to the principles of our constitution, that the crime of treason should not be extended by construction to doubtful cases...”

For levying of war, Marshall wrote that simply enlisting men for the purpose of overthrowing the government would not be sufficient to constitute treason; those associated by a “treasonable purpose” could not be guilty of treason without undertaking some action to effect that purpose, such as assembling. This idea did not allow judges to consider acts that had not yet “ripened into treason,” and therefore such acts did not give rise to a charge. Conspiratorial conduct or “minor offences” could be more appropriately addressed by the legislature.

The inflexible nature of the crime described by Chief Justice Marshall identified a nuance of the Constitution’s Treason Clause that was considered necessary in light of perceived abuses under the English law of treason that punished numerous forms of perceived disloyalty as treason. In 1787, English courts believed that acts of blatant disobedience or personal resistance to the enforcement of any one of the King’s laws were suitable for prosecution under

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27. Ex Parte Bollman, 8 U.S. (4 Cranch) 75 (1807).
28. Id. at 125-28.
29. Id. at 127.
30. Id. at 126.
31. Id. at 127.
32. Id.
the treason laws as “levying war.” These “constructive” treasons involved elevating minor crimes to the level of treason by imputing intent to overthrow the government and the symbolic levying of war.

Marshall’s emphasis on actual levying of war in *Bollman*, as opposed to a constructive levying, was important in light of the Whiskey Rebellion cases of 1795 that had found the defendants guilty of levying war against the United States by resisting the enforcement of a particular federal tax. The imputation in those cases was that any attempt to resist the execution of a federal law was tantamount to levying war against the nation. Chief Justice Marshall’s use of the word “actually” in *Bollman* suggested that the strength of the Constitution’s Treason Clause was in its predictability and finite interpretation. In the event of an actual levying of war, Marshall stated that all those participating or aiding those involved in the treasonable act, regardless of the location or extent of their participation, could then be considered traitors.

In spite of Chief Justice Marshall’s opinion, the idea of constructive treason persisted through 1851 when federal prosecutors brought treason charges against the individuals involved in the Christiana uprising. The defendant in *United States v. Hanway* was accused of participating in the uprising to prevent officers from enforcing the Fugitive Slave Law. Federal prosecutors argued at trial that an attempt to prevent the execution of a federal law was sufficient to constitute levying war and was consistent with substantial legal precedent. In their argument they cited Judge Story, who in 1842 said:

> [I]t is not necessary, that it should be a direct and positive intention entirely to subvert or overthrow the government. It will be equally treason, if the intention is by force to prevent the execution of any one or more general and public laws of the government, or to resist the exercise of any legitimate authority of the government in its sovereign capacity.

In *Hanway*’s majority opinion, Judge Grier rejected Story’s view when he distinguished between riotous behavior and treason in his charge to the jury and stated that if parties resist enforcement of the laws on themselves, the matter is of a private nature and not treason. Therefore, resisting a federal officer who

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34. *Hurst, supra* note 3, at 6.
37. *Ex Parte* Bollman, 8 U.S. (4 Cranch) 75 (1807) (using the word “actually” throughout the opinion).
38. *Id.* at 126.
40. *Id.* at 128.
41. *Id.* at 116.
42. *In re* Charge to Grand Jury, 30 F. Cas. 1046, 1047 (C.C.R.I. 1842) (No. 18,275).
43. *Hanway*, 26 F. Cas. at 128.
is attempting to recover a runaway slave was a lesser crime and punishable only under the Fugitive Slave Law. However, if the resistance should amount to the extent that the parties sought to preclude complete enforcement of the law, the actions take on a public nature and qualify as treasonous levying of war.\(^{44}\) In this particular instance there was no cause to invoke the treason charge because the act did not involve a larger motive against the existence or sovereignty of the Union, or even the enforcement of the law everywhere, and should not be so construed.\(^{45}\)

In January 1861, a state artillery company of Georgia captured Fort Pulaski from the United States army prior to Georgia’s secession from the Union.\(^{46}\) *United States v. Greiner* involved the treason prosecution of Charles Greiner, a member of the artillery company who was arrested in a northern state for his participation in the fort’s capture.\(^{47}\) Greiner and his compatriots were arrayed in military fashion, but obtained possession of the fort without any resistance.\(^{48}\) The question at trial was whether actual levying of war had occurred where the fort did not resist dispossession by engaging in combat.\(^{49}\) In other words, was the use of actual force required for levying of war?

District Judge Cadwalader’s opinion in *Greiner* stated that the absence of resistance did not preclude the act from being treason:  

> When a body, large or small, of armed men, is mustered in military array for a treasonable purpose, every step which any one of them takes in part execution of this purpose, is an overt act of levying war. This is true, though not a warlike blow may have been struck. The marching of such a corps, with such a purpose, in the direction in which such a blow might be struck, is levying war upon land.\(^{50}\)

Greiner was charged with treason for levying war against the United States, to which he owed allegiance as a citizen.\(^{51}\) The distinction can be made, therefore, between the Fort Pulaski incident and the Christiana uprising that, although resisting the enforcement of federal law might not be treason, harming the United States military by depriving the government of the use of its military fort was certainly treason. The larger motive against the Union, absent from the *Hanway* case, was clearly present here.

Two additional aspects of the *Greiner* case are important: (1) the nature of the defendant’s action displayed what Professor George P. Fletcher referred to as

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44. *Id.*  
45. *See Hanway*, 26 F. Cas. at 129 (discussing public resistance).  
47. *Id.* at 36.  
48. *Id.*  
49. *Id.* at 38-40.  
50. *Id.* at 39.  
51. *Id.* at 40, 41.
“manifest criminality,” eliminating the need for prosecutors to provide additional evidence of traitorous intent, and (2) the court did not find that the defendant owed a duty of allegiance to the State of Georgia first and to the United States second. As to the manifest criminality element, the court determined that the nature of the act itself was sufficient to establish a treasonous intent because the fort’s capture occurred in the context of a national insurrection and the government was usurped of its control over the facility. Subsequent judges might inferentially circumvent a defendant’s subjective state of mind and assess the treasonable criminality evident from the act itself.

The argument that Greiner was compelled by orders from the state of Georgia to act was determined insufficient to relieve his allegiance to the Union outside a showing of present fear of death. This holding was a blow to the compact theory of the Union which considered fidelity to the Union to be dissolvable and merely a discretionary choice for each state. As allegiance is at the heart of treason cases, the determination that residents of southern states maintained a primary duty to the Union, superseding any duty to their home states, constituted a foundation for treason indictments against Confederates.

**B. Civil War-era Cases**

In July 17, 1862, Congress passed an act which permitted those convicted of treason to avoid a death sentence, but rather face imprisonment of at least five years, a fine of at least $10,000, or both. Congress has the ability to provide the punishment for treason under the Constitution, but does not have the ability to re-define treason. This particular act provided courts with the discretion to proportionately punish whatever they might deem to be lesser treasons. A reduced form of treason punishment was used in *United States v. Greathouse* when ship captains, under a contract with Jefferson Davis, were convicted of outfitting vessels for the Confederacy sailing to disrupt the commerce of the Union.

In *Greathouse*, the defendants had not actually engaged in armed conflict with any Union forces, but their motives were clear because they sailed under a letter of marque from Jefferson Davis, authorizing acts of piracy against the Union. The Circuit Court of California reasoned that any overt act in

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52. Fletcher, *supra* note 3 at 206.
57. United States v. Greathouse, 26 F. Cas. 18, 21 (C.C.N.D. Cal. 1862) (No. 15,254).
60. *Id.* at 26.
furtherance of the goals of the public enemy, undertaken with treasonable intent, could suffice as levying of war, regardless of whether a violent act had been committed.61 The Greathouse holding re-affirmed Chief Justice Marshall’s opinion that any act, no matter how minor a role it played in the scheme of warfare, could suffice for actual levying of war provided that it reflected a treasonable intent.62

A controversial case involving treason through speech occurred the next year in a northern state. In 1863, a former United States congressman from Ohio, Clement Vallandigham, was arrested in Dayton, Ohio for violating General Burnside’s General Order No. 38, which categorized public expression of sympathy for the Confederacy as treason.63 Vallandigham had given a speech in Knox County, Ohio, where he referred to the president as “King Lincoln” and described the war as a product of despotism.64 He was tried for treason under the general order and found guilty.65 By order of the president, Vallandigham was delivered into the custody of General Rosecrans in Tennessee so that he might be sent beyond enemy lines.66 The United States Supreme Court reviewed the refusal of a writ of habeas corpus from the Ohio Circuit Court, but the Court did not review the constitutionality of treasonous speech.67 When the Court stated that it had no authority to review the finding of a military commission, it effectively permitted the treason conviction under the general order.68

Vallandigham may stand for nothing more than the power exercised by a military court as authorized by the president’s war powers. The later decision in Ex Parte Milligan, which held that American citizens in territories where the courts were open and functioning should be tried in civil courts rather than military tribunals, likely rendered the type of trial conducted in Vallandigham unlawful.69 The northern public, however, adopted a sympathetic response to the notion that disloyal speech could constitute treason. For instance, on May 15, 1863, a New York Times author claimed that if Vallandigham stands trial for treason than “no loyal man can doubt that he deserves severe punishment.”70 This view represented a substantial deviation from recognized civilian law.

61. Id. at 29.
62. Greathouse, 26 F. Cas. 18, 26 (C.C.N.D. 1862)(discussing Marshall and “treasonable purpose”).
63. Ex Parte Vallandigham, 28 F. Cas. 874 (C.C.S.D. Ohio 1863).
64. Id. at 884; see also Geoffrey R. Stone, Abraham Lincoln’s First Amendment, 78 N.Y. U.L. Rev. 1, 9 (2003).
65. Ex Parte Vallandigham, 28 F. Cas. 874, 924 (C.C.S.D. Ohio 1863).
68. Id. at 248.
69. Ex Parte Milligan, 71 U.S. 2, 123 (1866).
interpretations of treason.\textsuperscript{71} Such an approach to substantive treason law that targeted speech was at odds with previous definitions of treasonable conduct.

In 1861, Justice Nelson stated in a grand jury charge that spoken, written, or printed words were insufficient to constitute an overt act of treason.\textsuperscript{72} The Justice explained that the previous attempt to categorize such expressions as criminal was through the expired Sedition Act of 1798, which could not be used as the basis for a treason conviction any longer.\textsuperscript{73} Despite this clear distinction from a respected member of the judiciary, the atmosphere of war had so impassioned public opinion on treason that inconsistencies regarding what legally could suffice for the crime were commonplace.\textsuperscript{74}

Constructive treason for levying war reappeared in the Supreme Court of Wisconsin’s \textit{Druecker v. Salomon} case and exemplified how the legal understandings of treason varied.\textsuperscript{75} In \textit{Druecker}, the plaintiff participated in a draft riot on November 10, 1862, was arrested on November 25, and was held until January 19, 1863.\textsuperscript{76} He then sued the former governor of Wisconsin for false imprisonment.\textsuperscript{77} The court found that the unusually long detention of the plaintiff was justified, because he had levied war against the United States by vocally opposing the draft and by painting the words “No Draft” on a sign the day of the march.\textsuperscript{78} The court cited the opinion of Judge Story, used by the unsuccessful federal prosecutors in \textit{Hanway}, advocating that resistance against federal officers was tantamount to treason against the nation.\textsuperscript{79} In effect, the Wisconsin Supreme Court held that resistance to law enforcement could constitute levying of war, and additionally that written and spoken words could suffice for treason.\textsuperscript{80}

By the time Jefferson Davis faced charges of treason in 1867, the landscape of treason prosecutions had become so complicated, by both the Union’s use of military commissions and the judicial application of the constructive treason doctrine, that any federal judge presiding over a treason trial would have a myriad of recent, contradictory precedents from which to draw a ruling.\textsuperscript{81} When faced with a treason prosecution, the circuit courts encountered different questions in the interpretation of legal precedent. The different questions included: whether aspects of treasonable behavior might conflict with free

\begin{itemize}
  \item \textsuperscript{71} In re Charge to Grand Jury, 30 F. Cas. 1034 (C.C.S.D.N.Y. 1861) (No. 18,271) (providing Justice Nelson’s Grand Jury charge in regard to treason cases).
  \item \textsuperscript{72} Id. at 1035.
  \item \textsuperscript{73} Id.
  \item \textsuperscript{74} See generally Fletcher, supra note 22 (noting the evolution and history of treason).
  \item \textsuperscript{75} Druecker v. Salomon, 21 Wis. 621 (1867).
  \item \textsuperscript{76} Id. at 622-23.
  \item \textsuperscript{77} Id. at 622.
  \item \textsuperscript{78} Id. at 623, 631-32.
  \item \textsuperscript{79} Id. at 626-28.
  \item \textsuperscript{80} Id. at 626-27, 632.
  \item \textsuperscript{81} United States v. Hanway, 26 F. Cas. 105 (C.C.E.D. Pa. 1851) (No. 15,299); In re Charge to Grand Jury, 30 F. Cas. 1034 (C.C.S.D.N.Y. 1861).
\end{itemize}
speech; whether “levying war” under the Constitution could be broadly interpreted; whether an exchange of force was required for actual levying of war; and whether small acts conducive to the efforts of the enemy could be considered levying war. Yet, up until this point in time, the Supreme Court still had not reviewed the substantive law of treason.

One crucial issue pertaining to treason remained for the courts to resolve, and it featured prominently in the Davis case: permanent duties of allegiance. Given the inconsistencies apparent in the cases involving treason to that point, Chief Justice Chase had a unique opportunity in the Davis trial to provide clarity and predictability to the constitutional crime.

C. The Davis Trial

Jefferson Davis was captured on May 10, 1865, in Irwin Ville, Georgia, by Lieutenant-Colonel Benjamin Pritchard and the Fourth Michigan Cavalry. Davis had served as the Confederate president since his unanimous selection on February 9, 1861. With Confederate defeat in the war a virtual certainty, Davis fled with his family and house servants to join those forces still fighting west of Mississippi. Union President Andrew Johnson had made a proclamation ten days before on May 2, 1865 that the Confederate president was wanted for organizing and engineering the assassination of former President Lincoln. After Davis’s capture, he was taken to Fortress Monroe, Virginia and imprisoned there for his role as president of the Confederacy and for an alleged complicity in the Lincoln assassination.

Some legal scholars at the time believed that the issue of state sovereignty would re-emerge, even after the surrender at Appomattox, in federal prosecutions of captured Confederates. Secession and state sovereignty were, in fact, key strategy components for Davis’s lead defense attorney Charles O’Conor. Jefferson Davis saw his case as an opportunity to put the constitutionality of secession on trial by claiming the Constitution implied that individual loyalties were first owed to one’s home state and second to the federal...
government. 90 This understanding of the organization of the Union would have been consistent with the arrangement of states under the former Articles of Confederation. 91 However, inclusion of the Supremacy Clause in the Constitution, as well as cases resolved prior to and during the Civil War, suggested that courts might not recognize the doctrine of state sovereignty as a constitutional implication. 92

Nonetheless, if Davis were to win in a civil treason trial, many feared such a result would symbolically indicate the constitutionality of secession and additionally that the Union’s victory was unlawful. 93 On May 28, 1866, one of the attorneys for the United States, John H. Clifford, wrote William M. Evarts, one of his co-counsels, expressing doubts regarding the government’s evidence and suggested that the only way to win any treason case against Davis was to hand-pick a favorable jury to assure a guilty verdict. 94 In December of 1866, the Supreme Court decided Ex Parte Milligan, finding that civilians should be tried in civil courts, as opposed to military tribunals, where courts were open and functioning. 95 The issue of Davis’s treason would soon be pressed.

In spite of the Milligan holding, Davis remained in the custody of the military at Fortress Monroe through the end of 1866. 96 Secretary of War Stanton continued to oppose Davis’s trial in a civilian court, instead preferring a military commission. 97 During this time, Attorney General James Speed, who was charged by the president with leading the government’s case against Davis, resigned along with two other members of President Johnson’s cabinet over the administration’s reconstruction policies and caused delays in the Davis trial. 98 Henry Stanbery was chosen to replace Speed and he promptly suggested to the President and his cabinet that Davis should be transferred from Fortress Monroe to the state prison in Virginia because the war was over. 99 Meanwhile Davis was indicted for treason in the U.S. Circuit Court of Virginia on May 8, 1866, where

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90. Nicoletti, supra note 8, at 591.
91. The Articles of Confederation and Perpetual Union, art. II (1777).
92. See United States v. Cathcart, 25 F. Cas. 344, 346-48 (C.C.S.D. Ohio 1864) (No. 14,756) (addressing a similar argument as proposed in The Case of Davis, stating that the states were sovereign only to the extent that they maintain an “indisputable claim to the exercise of all rights and powers guarantied[sic] to them by the constitution . . .” and not in any other capacity); The Prize Cases, 67 U.S. (2 Black) 635 (1863) (Justice Grier stating that all citizens of the United States owe a “supreme allegiance to the federal government” and only a “qualified allegiance to the state in which they are domiciled.”).
94. Id. at 268, 268 n.10.
95. Ex Parte Milligan, 71 U.S. 2, 123 (1866).
96. Cooper, supra note 11, at 594; C. Ellen Connally, supra note 11, at 1193, 1199.
97. See Blair supra note 24, at 1517 (stating that Stanton and Senator Charles Sumner argued strongly against Davis’s release and that he be instead tried in a military tribunal where a guilty verdict was a virtual certainty).
98. Nichols, supra note 93, at 269.
99. Nichols, supra note 93, at 269-70.
Chief Justice Salmon P. Chase shared circuit duties with Judge John Curtiss Underwood. Underwood, however, did not approve a writ of habeas corpus for Jefferson Davis until May 1, 1867. To this point Davis had been held without trial for two years in military custody.

When Davis was finally brought before the court on May 13th as instructed under the writ, head defense counsel Charles O’Conor asked that Davis be granted bail pending the government’s initiation of arguments, offering as surety the promises of Horace Greeley, Gerrit Smith, and Cornelius Vanderbilt among others. Because the new U.S. Attorney General Henry Stanbery believed that his only courtroom duties were before the Supreme Court, William Evarts, the government’s special counsel, was left with just Virginia District Attorney Lucius H. Chandler to assist in the case following the resignation of Speed. Because this fact was not adequately relayed to Evarts and Chandler prior to Davis’s appearance in court on the 13th, in Stanbery’s absence they were forced to inform Judge Underwood that the government was unprepared to begin arguments. Considering the government’s lack of readiness and the absence of Chief Justice Chase, Judge Underwood released Jefferson Davis on bail pending the resumption of proceedings, scheduled for November of 1867.

In spite of all of these events which conspired to prevent the initiation of Davis’s trial, it would be difficult to overstate how great a role Chief Justice Salmon P. Chase personally played in the delay. Chase had circuit duties in the Virginia District court, and he was initially seen as an element that would provide legitimacy to a verdict against Davis. He was frequently absent, however, forcing Judge Underwood to postpone proceedings on several occasions. Some have speculated that this was because the Chief Justice had political aspirations for the presidency and was entertaining the possibility of running as a northern Democrat with a softer Reconstruction plan. Therefore, presiding over a treason conviction of the former Confederate leader posed substantial political consequences for the Chief Justice. Chase himself maintained that his reluctance to appear as requested had to do with his

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108. See Nichols, *supra* note 93 (noting the numerous postponements caused by Salmon P. Chase).
unwillingness to preside over civilian trials in a state still under military authority, where the judiciary was ultimately subject to the army’s power.\textsuperscript{111}

In addition to the state sovereignty argument proposed by Davis’s attorneys, a novel argument was advanced by an unlikely source in defense of Davis’s treason indictment: Gerrit Smith, the well-known abolitionist.\textsuperscript{112} Smith argued that the Confederate leaders could not be tried for treason, even though he readily admitted that they were clearly guilty of the crime.\textsuperscript{113} In what became known as the “tacit compact” or belligerent parties theory, Smith argued that the initial rebellion of the South, and therefore treason, was condoned by the North when it engaged in open warfare against it.\textsuperscript{114} Therefore, because the Union had engaged the Confederacy as a wartime belligerent, it had tacitly consented to the application of international law, rather than domestic, to govern the dispute.\textsuperscript{115} Under this theory, Davis and the other captured Confederate leaders could only be tried for war crimes, not treason, because the Union itself had abrogated the promises of allegiance.\textsuperscript{116} This view did not validate secession, but it still achieved the goal of preventing the United States from using civilian criminal law to punish rebels.

It is unlikely that the Supreme Court supported Smith’s far-fetched, “tacit compact” theory. As previously stated, the federal courts had established precedents based on the perpetual bonds of allegiance owed by the States and their citizens that had been upheld by the Supreme Court.\textsuperscript{117} During the December term of 1868, the Supreme Court decided \textit{Texas v. White}; the majority opinion written by Chase held that the southern states’ attempt to throw off allegiance to the United States was void.\textsuperscript{118} After \textit{Texas v. White}, it is reasonable to assume that Davis still owed a duty of allegiance to the United States, regardless of any attempt to argue that either the state sovereignty doctrine or the tacit compact theory abrogated such duty to the Union.

Chief Justice Chase, however, found an alternative avenue to dismiss the treason charge against Davis without having to decide on either the constitutionality of secession or duty of allegiance. On July 28, 1868, the Fourteenth Amendment was ratified by the states.\textsuperscript{119} Section three prohibited any individual who had previously taken an oath of allegiance to the federal government from ever again holding a position in government if that individual had participated in an insurrection against the United States.\textsuperscript{120} On November

\begin{footnotes}
\item[111] The Case of (Jefferson) Davis, 7 F. Cas. 63, 75 (1867-1871).
\item[112] BLAIR, supra note 24, at 24-26.
\item[113] BLAIR, supra note 24, at 25.
\item[114] BLAIR, supra note 24, at 25.
\item[115] BLAIR, supra note 24, at 25.
\item[116] BLAIR, supra note 24, at 25.
\item[118] Texas v. White, 74 U.S. (7 Wall.) 700, 733 (1868).
\item[119] COOPER, supra note 11, at 625.
\item[120] U.S. Const. amend. XIV, § 3.
\end{footnotes}
30th, 1868, Davis’s counsel argued that this clause was a criminal punishment against Confederate leaders like Davis, who had previously taken the oath as members of Congress. Therefore, prosecuting Davis for breaking that oath under a treason charge was precluded by the double jeopardy rule of the Fifth Amendment. The government attorneys disputed this theory, stating that the disenfranchisement clause was not intended as a penalty; rather it was only intended as a qualification for governmental service, such as an age or citizenship requirement.

On December 5th, Chief Justice Chase announced that he and Judge Underwood could not agree on whether the clause was a criminal punishment or a qualification standard for office. Chase asked Bradley T. Johnson, who reported the case, to record Chase’s belief that the third section of the Amendment effectively barred further proceedings against Davis for treason, and that he would submit the question to the Supreme Court. The Supreme Court never took up review of the question.

On February 15, 1869, largely as a result of the Attorney General’s disinterest in pursuing the issue of the Fourteenth amendment to the Supreme Court, the government entered a “no prosecution” motion to the Circuit Court, ending the federal government’s pursuit of treason charges against Jefferson Davis. In spite of a case featuring the commander-in-chief of rebel forces who had waged a four-year insurrection against the Union, one who had also been the chief advocate for the repudiation of allegiance to the Union, the federal government failed to obtain a guilty verdict for treason by levying war. Nor did they even argue the merits of the charge. In 1865, The New York Times wrote of Davis, “If he is guilty of anything he is guilty of treason, an offence defined by law, and for the punishment of which a certain mode of trial has been provided by the constitution.” The case against the “arch-traitor” had dissipated with the Virginia Circuit Court’s dismissal.

At the start of the war it would have been inconceivable that the leaders of the Confederacy could defeat a treason charge. Due mostly to the politics of reconstruction and preoccupation with the constitutionality of secession, the government did not ardently or effectively pursue the criminal charge of treason against Davis. A singular opportunity was lost because the issue of personal

121. The Case of (Jefferson) Davis, 7 F. Cas. 63, 88 (1867-1871).
122. Id. at 99.
123. Id. at 94.
124. Cooper, supra note 11, at 625.
125. The Case of Davis, 7 F. Cas. at 102.
126. Cooper, supra note 11, at 626.
127. Blair, supra note 24, at 32-33; Cooper, supra note 11, at 626.
129. See Connally, supra note 11, at 1182 (referring to Jefferson Davis as “arch traitor”).
130. See, e.g., Blair, supra note 24, at 33-34.
allegiance to the United States remains unclear today. Instead of defining the law of treason and deciding whether personal allegiance could be abrogated, Chase deferred to the political concerns of the day and left a major constitutional question in doubt. The result was that a man who levied war against the United States, under any definition of treason, was permitted to walk free.

D. Ex Parte Quirin and The Cramer Trial

Two cases following World War II played an integral role in shaping modern treason law: *Ex Parte Quirin* and *Cramer v. United States*. Both arose out of the Nazi Saboteur affair in 1942.\(^{131}\) *Quirin* concerned the prosecution of the saboteurs and whether to grant petition for a writ of habeas corpus, but it also delivered a massive blow to the applicability of the Treason Clause.\(^{132}\) The *Cramer* trial followed *Quirin* and dealt with one of the American-born conspirators implicated in the plot. The majority of cases that preceded *Cramer* focused on the “levying of war” aspect of the treason clause, yet the *Cramer* trial and those that came after primarily alleged treason by adhering to the enemy, providing aid and comfort.\(^{133}\)

In June of 1942, Nazi saboteurs landed in Long Island, New York, and Ponte Vedra, Florida, as part of a mission to disrupt American industry and hinder the war effort against Germany and Japan.\(^{134}\) One of the defendants in *Quirin* was Herbert Hans Haupt, an American citizen who joined the German navy for a clandestine mission.\(^{135}\) The government contended that Haupt had “by his conduct renounced or abandoned his United States citizenship.”\(^{136}\) This distinction seemed crucial because the defense argued that, as an American citizen, Haupt should be entitled to a civil trial in federal court for treason rather than by military tribunal, pursuant to the Court’s holding in *Ex Parte Milligan*.\(^{137}\)

The *Quirin* Court did not adopt the government’s position that Haupt had abrogated his citizenship and therefore allegiance, but rather the Court held that despite his citizenship he could be considered an “enemy belligerent” under the Hague Convention and therefore subject to the law of war as a result of his conduct.\(^{138}\) Important to this reasoning was the Court’s ability to find that Haupt was charged with conduct constituting “unlawful belligerency,” or having passed through enemy lines with the intention to wage war without the appropriate

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133. See Crane, supra note 5 (discussing *Cramer* and its aftermath).
134. Howard, supra note 131, at 375.
135. *Ex Parte Quirin*, 317 U.S. 1, 6-7 (1942).
136. Id. at 7.
137. Id. at 9.
138. Id. at 15-16.
uniform to designate him as a soldier. The Court stated that the crime of unlawful belligerency was distinct from treason because a treason charge did not require the absence of a uniform.

In dealing with the argument that Milligan required American citizens to be tried in civilian courts rather than military tribunals where courts were open and operating, the Quirin majority found that the defendant considered in Milligan was never affiliated with a military force of the enemy and therefore was not subject to the laws of war in any event. Haupt, however, was alleged to have joined with the German army and undertaken a mission on its behalf. What is curious about this reasoning is that the Court seems to presume Haupt’s guilt in determining whether a military or civilian court should have jurisdiction over his case. The effect was that an American citizen was tried under the law of war for an alleged crime that occurred on American soil. Therefore, the essential holding from Quirin is that citizens of the United States cannot avail themselves of the protection of a civilian trial if categorized as enemy belligerents.

In the Cramer case, Anthony Cramer was a German emigrant who had become a naturalized American citizen in 1936 and worked as a mechanic in a licorice factory. One of the agents was Werner Thiel, a former co-worker and roommate of Cramer. Thiel contacted Cramer by way of a note and requested a meeting at the Grand Central Station; Thiel himself did not sign his own name on the note, but instead used the pseudonym “Franz.” Cramer was surprised to see Thiel at the station, having believed him to be in Germany, and even postulated that Thiel could only have gotten to the United States by submarine.

Despite Cramer’s suspicions about Thiel’s arrival, Cramer agreed to keep some of Thiel’s money in a safe-deposit box for protection while he was in the country. Thiel used part of this sum to repay an outstanding debt to Cramer. Additionally, Thiel asked about his former fiancée, who still lived in New York, and whether Cramer was aware of her location. Cramer made efforts to arrange for their reunion and he had drinks with Thiel and Kerling, another Nazi agent, to discuss the plans for her arrival. A meeting between Cramer and the saboteurs was observed by two officers of the Federal Bureau of

139. Id. at 16.
140. Id.
141. Ex Parte Quirin, 317 U.S. 1, 19-20 (1942).
142. Id. at 7-8.
143. Id. at 20-21.
144. United States v. Cramer, 325 U.S. 1, 3 (1945); Howard, supra note 131, at 376.
146. Id. at 5, 50.
147. Id. at 5.
148. Id.
149. Id.
150. Id.
Investigation participating in an investigation into Kerling and Thiel’s arrival.\textsuperscript{152} The investigators did not actually overhear anything discussed nor did they observe any exchange of money or favors.\textsuperscript{153} The meeting was public and neither of the investigators could testify as to what was said or even what language was spoken.\textsuperscript{154} Cramer was arrested after this meeting and convicted of treason for adhering to the enemy, and providing aid and comfort to the enemy.\textsuperscript{155} His conviction was upheld on appeal by the U.S. Court of Appeals for the Second Circuit.\textsuperscript{156}

On review, the Supreme Court reversed the Court of Appeals on account of an inadmissibility of evidence issue, with only one Justice dissenting.\textsuperscript{157} Chief Justice Harlan Stone felt that it was imperative to debate and decide the constitutional issues, because he feared that the case might return before the Court to hear whether the overt act was sufficient.\textsuperscript{158} The \textit{Cramer} case provided the Court with a rare opportunity to consider the substantive law of treason, and Chief Justice Stone felt it was important to re-hear the arguments on the sufficiency of the overt act.\textsuperscript{159} Judge Learned Hand’s opinion in 1919 complicated the discussion of substantive treason law when he stated that the overt act must be treasonous on its face; in other words, the criminality of the action must be evident without having to infer additional evidence.\textsuperscript{160} When one applies such reasoning to the \textit{Cramer} case, the meeting between Cramer and the saboteurs for drinks in a public tavern would not constitute an overt act of treason because there was nothing facially criminal about meeting in a public place.

During the period of preparation before the re-argument, Fahy commissioned a study of the history of treason and asked James Willard Hurst to prepare the section regarding American legal history.\textsuperscript{161} According to the Court, Hurst’s study was invaluable to the \textit{Cramer} case and to the progress of legal history.\textsuperscript{162} Using Hurst’s study, which documents the intent behind the Treason Clause and also references prior cases, the Justices gained sufficient context to draft their opinions.\textsuperscript{163}

\begin{itemize}
\item \textsuperscript{152} Id. at 37.
\item \textsuperscript{153} Id.
\item \textsuperscript{154} Id.
\item \textsuperscript{155} Id. at 3, 5.
\item \textsuperscript{156} United States v. Cramer, 137 F.2d 888, 898 (2d Cir. 1943).
\item \textsuperscript{157} Howard, \textit{supra} note 131, at 394.
\item \textsuperscript{158} Crane, \textit{supra} note 5, at 646.
\item \textsuperscript{159} Howard, \textit{supra} note 131, at 397.
\item \textsuperscript{160} United States v. Robinson, 259 F. 685, 690 (S.D.N.Y. 1919).
\item \textsuperscript{161} Howard, \textit{supra} note 131, at 398.
\item \textsuperscript{162} See Cramer v. United States, 325 U.S. 1, 8 n. 9 (1945); Crane, \textit{supra} note 5, at 649; Howard, \textit{supra} note 131, at 398.
\item \textsuperscript{163} See Howard \textit{supra} note 131, at 399.
\end{itemize}
On April 23, 1945, the Court finally reversed the decision by way of a 5-to-4 vote. The Court's opinions regarding the sufficiency of the overt act and the application of the two-witness rule advocated different theories as to the level of protection that the Constitution makes available to defendants in treason trials. Chief among the Justices' concerns were two thoughts: if the overt act was too strictly defined, it might make treason nearly impossible to prove; but if the overt act was too broadly defined, the overt act and two-witness rule might become virtually meaningless.

In Cramer, Justice Jackson wrote for the majority and held that the overt act need not exhibit treasonable criminality on its face, but rather the act must indicate that aid and comfort were actually provided to the enemy. Such reasoning permits reasonable inferences regarding the act’s treasonable nature. Any evidence used to show that the defendant acted to provide aid and comfort to the enemy falls under the two-witness rule, but evidence which provides a treasonous context to that aid does not. In Anthony Cramer’s case, having drinks and conversation with the saboteurs did not actually provide aid and comfort to the enemy, because it could not be shown that the accused provided a benefit of treasonable character to Thiel and Kerling. In fact, Jackson noted, Cramer did not even buy the drinks.

The dissent argued that it should not be necessary to prove by two witnesses that the accused had provided aid and comfort, but rather, that the overt act had occurred. Instead, the provision of aid and comfort should be subject to inference of other evidence, even where it may be circumstantial. The opinion written by Justice Douglas reasoned that, although Anthony Cramer’s meeting with Thiel and Kerling may have appeared innocent on its face, other evidence provided the necessary context that the meeting at the public tavern aided and comforted the enemy. In Douglas’s view, this kind of contextual evidence should not be subject to a two-witness rule. Cramer had stated to

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165. Crane, supra note 5, at 651-52.
166. Crane, supra note 5, at 651-52.
167. See Cramer, 325 U.S. at 34.
168. Id. at 31-34.
169. Id.
170. Id. at 32-33.
171. Id. at 37-38 (stating that it could not be shown by the witnesses that Cramer provided any sort of counsel or even paid for the drinks); Benjamin A. Lewis, An Old Means to a Different End: The War on Terror, American Citizens . . . the Treason Clause, 34 Hofstra L. Rev. 1215, 1234 (2006).
174. Id. at 60.
175. Id. at 59-61.
176. Id.
law enforcement officials that he suspected Thiel had travelled to the U.S. by submarine and that he was engaged in a mission for the Germans.177 Douglas believed that Cramer’s suspicions and his subsequent meetings with Thiel adequately showed how Cramer’s treasonable intent moved from thought into action, and therefore it was sufficient to infer that the meetings provided aid and comfort.178 Much like Chief Justice Marshall’s opinion from Ex Parte Bollman, Douglas’s dissent defined treason by first recognizing when traitorous thoughts have become action.179 Douglas argued that the only function of the overt act was to prevent words and thoughts from being subject to inferences of criminality; it was not to make cases of actual treason impossible to prosecute.180

Justice Jackson’s opinion claimed that what “little imagination” is necessary to make the dissent’s inference of treasonable intent was still too great to overcome the meaning of “overt” in the Treason Clause.181 Jackson believed that the two-witness rule applied to all evidence used to infer that aid and comfort had actually been provided.182 He feared that during times of war, as a result of impassioned patriotism, any subjective inferences regarding the nature of an act might weigh too heavily in favor of finding criminality.183

In order to counter concerns that a high threshold might protect those enemies that operate in secret, Jackson suggested that Congress could establish other remedies to address conduct that would fall short of such a standard.184 However, Jackson denied that Congress had the ability to redefine treason or subsume the crime under a different name.185 His concern was that such an approach would be used to circumvent the Constitution’s procedural protections for treason, and that Congress could then make treasonable conduct easier to prosecute.186 This result would undermine the Framers’ intent by restricting the government’s ability to construe the crime of treason.

However, a minority in Cramer believed that this approach would not increase the government’s ability to punish treasonable conduct, instead they believed that it would lead to complete elimination of prosecutions for such actions.187 Justice Harlan Stone postulated that, as a result of the Cramer standards for the overt act and the heightened evidentiary threshold, individuals committing treasonable acts would be impervious to prosecution, except in cases of levying war.188 Treason prosecutions for adherence did not go away after the

177. Id. at 53.
178. Id. at 62-63.
180. Id.
181. Id. at 37-38.
182. Id. at 34-35.
183. Id. at 43-48.
184. Id. at 45.
185. Id.
187. Crane, supra note 5, at 661-666.
188. Crane, supra note 5, at 673.
Cramer trial.\textsuperscript{189} In fact, a surge of cases in the decade following Cramer indicated that guidance from the Supreme Court motivated prosecutors, like never before, to bring indictments for adherence.\textsuperscript{190} However, by 1954, that trend had come to an abrupt halt.\textsuperscript{191}

\textbf{E. Post-Cramer Cases Where the Treason Clause Was Found Inapplicable}

The espionage trial of Julius and Ethel Rosenberg from 1952 highlights how treasonable conduct can be prosecuted under a heading other than treason and also how prosecutors can circumvent the procedural protections of the Constitution.\textsuperscript{192} The Rosenbergs were charged with delivering military secrets to the Soviets in violation of the Espionage Act.\textsuperscript{193} The defense argued that charging the Rosenbergs with espionage rather than treason deprived them of constitutional protections under the Treason Clause.\textsuperscript{194} The court dispelled this argument, holding that while the Rosenbergs could be tried for treason, this did not mean that they must be tried under that heading.\textsuperscript{195} The Rosenberg holding stands for the proposition that a nexus of interchangeability exists between a treason charge and an espionage charge.\textsuperscript{196} Both crimes involve a possible death penalty.\textsuperscript{197} This rationale upheld the Cramer majority’s finding that a treason charge need not be the exclusive means to punish conduct that poses an existential threat to the government.\textsuperscript{198}

In 2004, the Supreme Court heard Hamdi v. Rumsfeld, the case of an American citizen captured in Afghanistan for allegedly fighting alongside the Taliban, and the Court addressed whether Hamdi was illegally detained and subject to a military trial.\textsuperscript{199} The Fourth Circuit opinion cited Ex Parte Quirin as the basis for determining that the defendant was appropriately categorized as an enemy combatant and therefore subject to a military trial for crimes against the laws of war.\textsuperscript{200} The Supreme Court’s majority opinion also distinguished itself from Milligan, as had the Quirin court, and held that because Hamdi was alleged to have fought alongside the enemy he was appropriately categorized as an

\begin{itemize}
\item \textsuperscript{189} See Hurst, supra note 3, at 265-267; Crane, supra note 5, at 677 (stating that nearly a dozen cases came to trial for treason between 1945 and 1954).
\item \textsuperscript{190} See Crane, supra note 5, at 678-80.
\item \textsuperscript{191} See Crane, supra note 5, at 636-37 (discussing period after 1954 when treason charges were absent).
\item \textsuperscript{192} United States v. Rosenberg, 195 F.2d 583 (2d Cir. 1952).
\item \textsuperscript{193} \textit{Id}. at 608.
\item \textsuperscript{194} \textit{Id}. at 609-11.
\item \textsuperscript{195} \textit{Id}.
\item \textsuperscript{196} Crane, supra note 5, at 684.
\item \textsuperscript{197} Rosenberg, 195 F.2d at 611 (discussing death penalty applicability for both treason and espionage).
\item \textsuperscript{198} \textit{Id}.
\item \textsuperscript{199} Hamdi v. Rumsfeld, 542 U.S. 507 (2004).
\item \textsuperscript{200} Hamdi v. Rumsfeld, 316 F.3d 450, 475 (4th Cir. 2003).
\end{itemize}
enemy combatant and thus he was not automatically subject to a trial in a civilian court.201

III. CONCLUSION

The trials discussed in the preceding sections represent the majority of case law on treason. However, because these cases present no clear advice on how to consistently apply the Treason Clause in future trials, a substantive template that is both coherent and adapted to modern treason law is noticeably absent. Such a template could guide prosecutors in bringing successful treason prosecutions, but it could also serve to renew the idea that our Constitution’s Treason Clause serves to protect American citizens from overreach by a powerful government. Therefore, the utility of the Treason Clause is two-fold: it serves a deterrent function by describing the particular conduct which constitutes a capital offense, and it protects citizens wrongly accused of the same crime.

The Constitution is a document of the people and for the people, and so it would stand to reason that a common citizen should be able to understand the only crime found in the Constitution. In clear and unambiguous language, the Constitution states that those who are accused of levying war against the United States will be tried for treason, and, on the other hand, they are procedurally protected by a two-witness rule and an overt act requirement.202 However, in Hamdi v. Rumsfeld, the majority of the Court held that an American citizen who fought alongside an enemy of the United States was not protected under the Constitution’s Treason Clause because he qualified as an “enemy combatant.”203 Hamdi’s holding increases the likelihood that treason charges will remain a rare occurrence.

The Civil War era left open several questions that must be addressed: whether speech alone could constitute treason; whether “levying war” could be broadly interpreted under the Constitution to include violent acts of opposition to the authority of the United States; and, crucially, whether obligations of allegiance to the United States could be abrogated when the defendant fought for the enemy. These questions will be addressed separately and in respective order.

Holding any type of speech to be treason would constitute dangerous precedent, precedent that the current Court would not likely follow. Justice Nelson’s grand jury charge that words, either spoken or written, could not be treason is consistent with modern ideas regarding free speech. However, a distinction can be made between speech which advocates the government’s overthrow and speech which instructs those capable of overthrowing the

203. Hamdi v. Rumsfeld, 542 U.S. 507 (2004)(mentioning treason, and although there was no majority opinion, a majority of Justices agreed that Hamdi could be held as an enemy combatant, though he must be given some due process).
government to do so. During a time of war, Clement Vallandigham made a speech in front of a crowd accusing the federal government of authoritarianism and his conviction for treason should have been unlawful.\footnote{Ex Parte Vallandigham, 68 U.S. (1 Wall.) 243, 24344 (1863) (discussing Vallandigham’s comments).} Speech that directly aids the enemy in accomplishing its goals of fighting the United States, as is alleged in the Adam Gadahn indictment,\footnote{See Gadahn Indictment, supra note 21, at 3 (discussing indictment of Gadahn and his comments).} should be susceptible to a treason charge. Meanwhile, Professor Tom Bell makes a strong argument that “treasonous expression” cases should be limited to those where the accused is actually in the employ of the enemy.\footnote{Bell, supra note 22, at 1040-41.}

The Framers’ intention is clear with respect to how broad one should interpret treasonable conduct: “Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort.”\footnote{U.S. CONST. art. III, § 3 (emphasis added).} The framers clearly intended a strict definition of treason. However, modern political developments cloud what should be a clear meaning of treason. At minimum, the definition should include any participation in armed efforts to destroy vital components of American society.

The case of Jefferson Davis should have decided whether individuals who were American residents engaging in insurrection were permanently accountable to American allegiance under the Treason Clause. If the Virginia Circuit Court had decided this issue, it could have served as powerful precedent for Herbert Hans Haupt in Ex Parte Quirin, Yaser Esam Hamdi in Hamdi, and others who were accused of conduct amounting to treason against the United States. Contrary to the holdings in Quirin and Hamdi, American citizens should be able to depend on the Constitution’s guarantee of a trial in civilian court, regardless of the charge, absent a suspension of habeas corpus in times of war.

Treason’s disappearance in the past sixty years suggests that something may have profoundly changed related to how Americans view the concept of allegiance or whether the government is able to demand loyalty from its people.\footnote{See George P. Fletcher, Loyalty: An Essay on the Morality of Relationships 58 (1993).} Whether treasonable conduct satisfies the legal standard under a treason charge or whether it should be prosecuted under another heading may weigh into a prosecutor’s decision to issue an indictment for treason.\footnote{See, e.g., Babb, supra note 22, at 1739-40; Crane, supra note 5, at 681-85.} One possibility for the absence of treason trials is that Americans find it hard to fathom that our people still commit treason. In our minds, treason is a crime from our country’s past.

James Willard Hurst noted that the charge of treason for levying war against the United States was used only once after the Davis trial, despite occurrences of
violent railroad strikes in 1877, the Haymarket affair of 1886, and the Pullman strike in 1894. All represented assembled, forcible acts that substantially threatened public safety and could have been considered treason under either the Druecker v. Salomon case or the rationale proposed by Judge Story. Because only the Hanway case held conclusively against constructive treason by levying war, it is difficult to know how a court would have interpreted incidents like the Haymarket affair if treason charges had been brought. The Supreme Court could have provided a guiding model for evaluating treasonable conduct by reviewing Davis’s case.

Historically, one distinction between cases featuring treasonous charges for adherence, as opposed to levying of war, has been the increased flexibility in identifying an overt act as required by the Constitution. For levying war, an overt act is satisfied by conduct where individuals assemble and use force to perform an act of treasonable purpose. However, for adherence, an overt act takes on a more generic nature. The broad type of conduct that can be categorized as providing aid or comfort to the enemy is substantially greater than what traditionally has constituted levying of war, and this conduct may even seem largely innocuous on its face. However, in the absence of consistent legal precedent, even though overt acts under a charge of enemy adherence may seem more susceptible to interpretation, it is conceivable that many forms of modern political expression could still be considered levying war against the United States. The inability to predict how the standard will be applied represents the danger associated with an undefined Treason Clause.

Treason indictments vanished after 1954, despite acts of espionage and betrayal by American citizens. The reason for this phenomenon has been debated by legal scholars and resulted in varied interpretations. One reason frequently cited for treason’s disappearance is that prosecutors since 1954 have preferred to pursue treasonable conduct under different criminal laws, including espionage, trading with the enemy, and seditious conspiracy, because these offenses require relaxed evidentiary standards compared to treason. Each of the alternative crimes addresses particular conduct and particular individuals with the kind of specificity described by Justice Jackson in Cramer, and

210. HURST, supra note 3, at 199.
211. Ex Parte Bollman, 8 U.S. (4 Cranch) 75, 126 (1807).
212. Crane, supra note 5, at 637; see also Holzer, supra note 22, at 183-84.
213. See, e.g., Fletcher, supra note 22, at 1627-28 (arguing that treason prosecutions have become exceedingly rare as a result of a movement away from symbolic allegiance to the state in favor of a more scientific and objective approach to eliminating criminality); Crane, supra note 5, at 681-96 (arguing that the relative difficulty in satisfying the high evidentiary standard for the crime of treason following the Cramer trial coupled with the advantage of prosecutorial discretion to pursue the conduct under more provable crimes has resulted in the near extinction of treason indictments); Eichensehr, supra note 22, at 1507 (arguing that explanations previously offered to explain treason’s decline as resulting from its anti-liberal nature in suppressing political dissent are inaccurate because modern treason laws have adapted to focus on acts instead of beliefs).
214. See Crane supra note 5, at 681-96.
therefore each of the alternatives presumably offers prosecutors greater flexibility and a better chance of gaining a conviction. From a pragmatic perspective, discretionary circumvention of the Treason Clause results in the government’s assurance that conduct threatening national security will not go unpunished because of inability to meet a heightened procedural standard. Yet, the fact that the Constitution includes a restrictive definition of treason indicates that the Framers recognized a danger to personal liberty if the definition were ever enlarged or contracted.

The move towards circumvention of the Treason Clause may very well have begun with the Jefferson Davis result. Those living during the Civil War were well aware of the Vallandigham case and the fact that Davis was punished under a treason charge for merely vocalizing opposition to the Lincoln administration. In 1861, Charles Greiner was charged with treason for his role in the capture of Fort Pulaski. Less than a decade later, however, Jefferson Davis walked free because of the Supreme Court’s reluctance to review his case, despite Davis having commanded the military force that waged war against the United States government and its people. Such asymmetric results displayed inconsistency in the administration of treason law to those attempting to predict how, and if, the constitutional crime would be prosecuted.

Benjamin A. Lewis has predicted that treason is due for a renaissance because of its broader applicability when compared to conspiracy or espionage. Reliance on seditious conspiracy and other crimes to address treasonable conduct may be preferable because of its comparative procedural standards, but jurisdictional problems limit such crimes where the treason charge would be unaffected. The prospect of this renewal raises concerns for those that believe subjective inferences of treasonable intent, which are permitted without the testimony of two witnesses, pose a substantial threat to First Amendment speech if framed under the “adherence to the enemy” component of treason. Levying of war may be equally susceptible to these inferences because of lack of clarity in its legal definition. Therefore, any renewal of treason indictments should be accompanied by a clear definition from the Court concerning when levying war may constitute treason.

At this point it is worth asking whether increased use of the treason charge is a positive, negative, or neutral appraisable quality. Perhaps the idea of

216. Ex Parte Vallandigham, 28 F. Cas. 874, 924 (C.C.S.D. Ohio 1863).
218. See Connally, supra note 11, at 1199 (noting Jefferson Davis’s release).
220. Lewis, supra note 22, at 1263.
221. Lewis, supra note 22, at 1262-65.
222. Bell, supra note 22, at 1012-16.
allegiance is so intrinsically tied to the concept of national identity that it is important to continually exercise scrutiny over criminal acts of disloyalty and to do so primarily through treason indictments. If legal and moral justice, as has been argued, are achieved by consistently punishing conduct prohibited under the law, our country has failed by not prosecuting these acts under their proper heading – treason. If the Supreme Court had considered the case of Davis it would have been forced to determine whether, as a resident of a seceded state and the commander of a belligerent force, Davis still owed an allegiance to the Union. Such a holding could have served as precedent for Ex Parte Quirin, as well as modern cases involving domestic terrorists, where the question of allegiance could determine whether treason or a crime of seditious conspiracy is most applicable.

The state of conflict involving the United States since 2001, often referred to as the “War on Terror,” remains a possible testing ground for the modern day viability of the charge of treason. John Walker Lindh was famously convicted of supplying services to the enemy and carrying an explosive while committing a felony, rather than treason. To Professor Henry Mark Holzer, this was a “colossal mistake.” He contended in his article entitled Why Not Call It Treason? that failing to bring a treason charge against those most deserving of the indictment works a substantial injustice. It could also be said that such failure confuses the populace about what constitutes treason and minimizes our ability to deter similar behavior in the future.

Whatever the future holds for treason, be it increased use for trials like Adam Gadahn, a man indicted for treason in a California federal court for his extensive service to Al-Qaeda, or continued abandonment, the United States has been unable to form a concrete understanding of treason over the past 200 years. As a result of a 52-year lull, perhaps our courts have been out of touch with treason for so long that it will not make a significant re-appearance. Additionally, prosecutors have displayed a preference for alternative approaches to punishing treasonable behavior that avoid heightened evidentiary requirements and the complicated substantive law of overt acts.

Because the Jefferson Davis trial caused exceptional public scrutiny at the time, it had a singular opportunity to provide American courts and the populace with an understandable framework for treason prosecutions which, in turn, could have built upon Chief Justice Marshall’s opinion in Bollman and laid the groundwork for cases like Ex Parte Quirin, Cramer, Rosenberg, and Hamdi v.

223. See Eichensehr, supra note 22, at 1489.
224. Holzer, supra note 22, at 221-22.
225. See Larson, supra note 22, at 867-69.
227. Holzer, supra note 22, at 221.
228. Holzer, supra note 22, at 221.
229. See Gadahn Indictment, supra note 21.
230. See Crane, supra note 5, at 693-95.
Rumsfeld. The Court faced unprecedented potential to expand on the legal theories advanced by Marshall and to deliver a holding that could serve as a conduit between traditional, ancient interpretations of treason and more modern understandings. Of course, the absence of treason from American jurisprudence during the last fifty years was not due to the Davis dismissal. Rather, the Chase court’s reluctance to provide a decisive holding against the country’s most notorious traitor exemplified how muddled the law of treason was then, and these same laws remain mixed-up today.

The Jefferson Davis trial could have significantly benefitted American treason jurisprudence by delivering a substantive framework for evaluating treason charges. Yet, its failure to provide such guidance promoted a general attitude of discomfort and confusion in American courts for understanding how the concept of allegiance fits into the national consciousness. Some of the greatest threats to the United States’s national security in the recent past have come from the domestic population, yet the jurisprudential tool of treason remains on the sideline.
GENERAL ORDERS NO. 100: WHY THE LIEBER CODE’S REQUIREMENT FOR COMBATANTS TO WEAR UNIFORMS IS STILL APPLICABLE FOR THE PROTECTION OF CIVILIAN POPULATIONS IN MODERN WARFARE

Robert Cummings*

“As the order now stands, I think the No. 100 will do honor to our country. It will be adopted as a basis for similar works by the English, French and Germans. It is a contribution by the U.S. to the stock of common civilisation [sic].” - Dr. Francis Lieber, 1863.¹

I. INTRODUCTION

In the current War on Terror, the United States is involved in military actions in which it is difficult, and at times impossible, to distinguish combatants from civilians.² In Iraq and Afghanistan, regular combat troops are fighting insurgents that have no formal command structure, do not wear uniforms or display insignias distinguishing themselves from noncombatants, do not carry their arms in the open, and do not obey the customs and laws of war.³ At the beginning of the war, the United States Army had standing rules of engagement that were designed for applying force for self-defense (such as repelling an invasion during a time of peace) and fighting an identifiable enemy (a traditional war between nations).⁴ Because they are fighting enemies that cannot be identified as belligerents except when they are actually engaged in combat, the United States has decided to treat them as unlawful combatants when captured.⁵ Francis Lieber acknowledged the difficulty in fighting an un-uniformed enemy; Article 82 of the Lieber Code provided that “[m]en . . . divesting themselves of the character or appearance of soldiers – such men, or squads of men, are not public enemies, and, therefore, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates.”⁶

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⁴ Id. at 5.
⁵ Id. at 16.
⁶ General Orders No. 100 art. 82, reprinted in Hartigan, supra note 1, at 60 [hereinafter General Orders No. 100].
The Geneva Conventions’ “Basic Rule” of the laws of war states: “In order to ensure . . . protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”7 It is readily apparent that the Geneva Conventions are concerned with the protection of civilian lives and property and expressly forbid civilian populations and property from being targeted.8 The Geneva Conventions not only provide protection for the civilian population, they also grant immunity for combatants that follow the laws of war.9 Essential in the distinguishing of combatants from noncombatants is the requirement to wear a uniform or a “fixed insignia recognizable at a distance to help draw fire away from non-combatant civilians.”10

Over 100 years before Additional Protocol I of the Geneva Conventions adopted the “Basic Rule,” General Henry Halleck wrote the following to Francis Lieber:

The rebel authorities claim the right to send men, in the garb of peaceful citizens, to waylay and attack our troops, to burn bridges and houses and to destroy property and persons within our lines. They demand that such persons be treated as ordinary belligerents, and that when captured they have extended to them the same rights as other prisoners of war; they also threaten that if such persons be punished as marauders and spies they will retaliate by executing our prisoners in their possession.11

This letter was just one of many between General Halleck and Professor Lieber that would lead to the eventual drafting and adoption of General Orders No. 100, popularly known as the Lieber Code.12 Lieber’s code was “the first attempt to make a comprehensive survey of all the exigencies to which a war of invasion is likely to give rise . . . .”13

The purpose of this article is to demonstrate that current United States policy regarding the identification of combatants from noncombatants (and thus

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8. Id.
9. Janin, supra note 2, at 86.
11. Letter from Henry Halleck to Francis Lieber (Aug. 6, 1862) reprinted in Hartigan, supra note 1, at 78.
identifying belligerents and granting prisoner of war status to some combatants and not others) is more in line with the vision promulgated by Doctor Francis Lieber over 150 years ago. It is a more workable solution to protect noncombatants from combatants than would result from the recognition of Additional Protocol I of the Geneva Conventions. Part II will show the development of Francis Lieber’s writings on the code of warfare and the subsequent conventions that his work influenced. Part III will demonstrate that Francis Lieber’s requirement for identifying belligerents is still relevant today. Part IV will show that when faced with making a determination as to a combatant’s status, United States courts have consistently used the wearing of uniforms as a requirement for being deemed a lawful combatant. Part V will compare the possible outcomes of interpreting belligerency status under the Lieber Code and Additional Protocol I of the Geneva Conventions. Part VI will summarize how the Lieber Code is still influential today and conclude with showing that it was instrumental in the development of international laws of conflict.

II. BACKGROUND

Prussian born Francis Lieber witnessed Napoleon’s march through Berlin in 1806, joined the Prussian army when Napoleon returned from exile, and was wounded at Waterloo. After returning from a brief venture to Greece, in which he grew frustrated with the lack of action while wanting to fight for Greek independence, Lieber returned to Germany. Lieber was considered too liberal for the establishment, and he was later jailed for his contrary views. Because his politics were no longer welcome in his homeland, Dr. Lieber immigrated to the United States and spent twenty years at the University of South Carolina. Finding his opinions on slavery and secession at odds with the South Carolina establishment, Dr. Lieber moved to New York in 1857 and became a professor at Columbia College.

While at Columbia, Dr. Lieber began his correspondence with General Henry Halleck which led to his famous work on the rules of war. Francis Lieber understood that sometimes wars were necessary and brutal (bemoaning that as of January 1862 traitors and spies were not being hanged), but he also

15. Id.
16. Id. at 152.
17. Id.
18. Id.
19. HARTIGAN, supra note 1, at 2.
envisioned that warfare need not kill innocent civilians and destroy their property indiscriminately.  

A. Guerrilla Parties Considered with Reference to the Laws and Usages of War

After the outbreak of the American Civil War, Dr. Lieber published a pamphlet entitled Guerrilla Parties Considered with Reference to the Laws and Usages of War.22 In Guerrilla Parties, Lieber recognized and defined both lawful and unlawful combatants; his designations were: guerrilla, guerrilla party, brigand, partisan and free corps, spy, and war-rebel.23 Dr. Lieber argued that the lack of a uniform was “prima facie evidence” against an unlawful combatant; but he also recognized that in certain instances, armed citizens would band together to protect their homeland from invasion.24 These citizens banding together would not have the provision or organization of an army, but, even though they would be non-uniformed, they would still be considered lawful combatants despite their lack of a uniform.25 This recognition of civilian uprisings in the face of an approaching army was adopted, virtually word for word, by the Hague Convention of 1899 (The Hague).26

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22. Francis Lieber, Guerrilla Parties Considered with Reference to the Laws and Usages of War, reprinted in HARTIGAN, supra note 1, at 31 [hereinafter Guerrilla Parties].
23. “Guerilla Party: an irregular band of armed men, carrying on an irregular war, not being able, according to their character as a guerrilla party, to carry on what the law terms a regular war; Brigand: a soldier who detaches himself from his troop and commits robbery . . . ; Partisan and free corps – designated bodies detached from that of his own main army; the partisan acts chiefly upon the enemy’s lines of connection and communication, and outside of or beyond the lines of operation of his own army, in the rear and on the flanks of the enemy. . . . [H]e is part and parcel of the army . . . and entitled to the privileges of the law of war; Free corps – troops not belonging to the regular army . . . used for petty war, and not incorporated with the ordre de bataille; Spy – a person dwelling in a district under military occupation and giving information to the government of which he was subject, but which has been expelled by the victorious invader; War-rebel – a renewer of war within an occupied territory. The war rebel exposes the occupying army to the greatest danger, and essentially interferes with the mitigation of the severity of war, which is one of the noblest objects of the modern law of war to obtain.” Id. at 33-37.
24. Id. at 39.
25. “. . . the rising of the people to invasion entitles them to the full benefits of the law of war, and that the invader cannot well inquire into the origin of the armed masses opposing him; that is to say, he will be obliged to treat the captured citizens in arms as prisoners of war, so long as they openly oppose him in respectable numbers and have risen in the yet uninvaded or unconquered portions of the hostile country.” Id.
26. “The status of belligerent also applies . . . to inhabitants of a non-occupied territory who, on the approach of the enemy, spontaneously take up arms to resist the invading forces. This refers to a mass rising. The enemy is obliged to recognize the belligerent status of the inhabitants when they carry arms openly and respect the laws and customs of war, even though they may not have had time to form themselves into regular armed units as required by Article 1.” Hague Convention (II) with Respect to the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land ch. 1 art. 1, July 29, 1899, 32 Stat. 1803 [hereinafter The Hague II], available at http://www.icrc.org/ihl.nsf/FULL/150?OpenDocument.
Besides defining guerrilla parties, Lieber went on to explain that they were not associated with a regular army for pay, provision, movement, nor did they take and hold territory or take prisoners.\textsuperscript{27} These types of combatants were all the more dangerous because they could drop their arms and melt into the civilian population undetected.\textsuperscript{28} It is against this backdrop that General Halleck and Dr. Lieber realized the need for codifying the rules of war.

After General Halleck forwarded Lieber’s request for writing such a code, President Lincoln created a commission to write a series of regulations that would guide the Union Army’s conduct in war.\textsuperscript{29} Francis Lieber and four generals were assigned to the commission and drafted General Orders No. 100, also known as the Lieber Code.\textsuperscript{30}

\textbf{B. General Orders No. 100 – the Lieber Code}

The Lieber Code is replete with instructions regarding the protection of the civilian population.\textsuperscript{31} The code requires soldiers to be “guided by the principals of justice, honor, and humanity - virtues adorning a soldier even more than other men, for the very reason that he possesses the power of his arms against the unarmed.”\textsuperscript{32} The code went on to instruct that before an army bombards an enemy city, the commanders were to inform the enemy of their intentions so noncombatants could be spared; but Lieber also recognized that an army may need the element of surprise in order for an attack to be successful and civilian casualties may not be avoided.\textsuperscript{33} While there is recognition in the Lieber Code that innocent civilians may be harmed during an armed conflict, there is an underlying theme that combatants and noncombatants need to be distinguished from each other to avoid the unnecessary taking of innocent lives.

To avoid this taking of innocent lives, Lieber required that combatants wear a uniform.\textsuperscript{34} Under the Lieber Code, those captured on the battlefield not wearing uniforms should expect to receive no quarter,\textsuperscript{35} that is, not “showing mercy to a defeated enemy by sparing lives and accepting surrender.”\textsuperscript{36} The modern laws of war have abandoned the harsh rule of no quarter for prisoners out of uniform, but they still retain the other requirements of combatants distinguishing themselves from noncombatants.\textsuperscript{37} This distinction that Dr.
Lieber made between combatants and noncombatants was directly reflected in future conferences on codifying the international laws of armed conflict.

C. The Hague and Geneva Conventions

Czar Alexander II of Russia organized a conference to codify the “laws and customs of war” that was held in Brussels, Belgium in 1874.\(^{38}\) The Russian delegate and president of the convention, Baron Jomini, avowed that his concept of having an international code of war was to be credited to President Lincoln and his issuance of General Orders No. 100, and by extension to Dr. Francis Lieber.\(^{39}\) The Brussels conference used language that is still familiar in modern times by declaring that belligerents must “be commanded by a person responsible for his subordinates . . . have a fixed distinctive emblem recognizable at a distance . . . carry arms openly and . . . conduct their operations in accordance with the laws and customs of war.”\(^{40}\)

Although the agreement from this conference was never formally adopted, the Brussels Conference provided the framework for The Hague Convention of 1899 by defining qualifications of belligerents,\(^{41}\) which the Geneva Conventions used as the requirements for determining prisoner of war status.\(^{42}\)

1. The Hague Convention of 1899

The Hague Convention of 1899 was held with the intent to ratify an agreement for the laws of land warfare, similar to the goals that were not realized at the Brussels Conference.\(^{43}\) This agreement was ratified and was later revised slightly in 1907 (forty-nine countries ratified the 1899 agreement, but eighteen of the original forty-nine did not ratify the 1907 version).\(^{44}\) The regulations set out from The Hague Convention were “the first binding multilateral standards for armed conflict and, as such, signify the beginnings of modern international humanitarian law.”\(^{45}\)

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\(^{41}\) Juragua Iron Co. v. United States, 42 Ct. Cl. 99, 109 (Ct. Cl. 1907).


\(^{43}\) The Hague II ch. 1 art. 1, supra note 26.


The document ratified by the Convention began by defining the qualifications of belligerents. Section I, Chapter I, Article 1 states:

The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:
1. To be commanded by a person responsible for his subordinates;
2. To have a fixed distinctive emblem recognizable at a distance;
3. To carry arms openly; and
4. To conduct their operations in accordance with the laws and customs of war. In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination "army." The prominence of this article indicates that identification of belligerents was of great importance to the drafters of The Hague Convention. However, the convention was inadequate in many regards, most notably in providing for the treatment of prisoners of war. The Berne Agreements of 1917 attempted to deal with the problems associated with the treatment of prisoners of war, but it was not until the Geneva Conventions that adequate protections came about.

2. The Geneva Conventions

Compared to The Hague Convention, the Geneva Conventions of 1949 had a much larger impact as it was ratified by 194 countries. Convention (III) Relative to the Treatment of Prisoners of War, Geneva, 12 August 1949 uses almost identical language to The Hague Convention in order to define who should be given prisoner of war status. The provision is still given prominent status, being Article 4, with the preceding articles primarily defining to whom the succeeding articles apply. In 1977, The Geneva Conventions adopted additional Protocols I and II, and Additional Protocol III was adopted in 2005 (the United States did not adopt any of the Additional Protocols).

46. The Hague II ch. 1 art. 1, supra note 26.
47. Id.
48. Mofidi, supra note 45, at 64.
49. Id.
51. “Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions: (a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; (d) that of conducting their operations in accordance with the laws and customs of war.” Id. at part I art. 4(2).
52. Additional Protocol I, supra note 7; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed
The protections for prisoners of war that the Geneva Conventions provide only apply to recognized lawful combatants (thus excluding civilians as well as terrorists) as defined in Article 4 – the requirements for a command structure, identifying insignia, carrying arms openly, and complying with the laws of war.\(^{53}\) Beginning with the Lieber Code, through The Hague Convention, and ending with the Geneva Conventions, the identification of combatants had bright line tests for determining the status of a combatant; the adoption of Additional Protocol I would “blur” those lines.\(^{54}\)

**D. Additional Protocol I**

In 1977, the Geneva Conventions were amended to include Additional Protocol I.\(^{55}\) The United States did not ratify Additional Protocol I because it could be interpreted that terrorist organizations would be indistinguishable from noncombatants.\(^{56}\) The most disputed part of the protocol was Article 44 which reads, in part:

3. In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:
   (a) during each military engagement, and
   (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.\(^{57}\)

This language is quite a departure from the original Conventions because it allows a person to be a combatant or a civilian, depending upon his or her current actions (or status), instead of at all times being one or the other.\(^{58}\) President Ronald Reagan stated that “Protocol I is fundamentally and irreconcilably flawed.”\(^{59}\) He went on to explain that there were philosophical

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57. Additional Protocol I, *supra* note 7, at art. 44.
59. *Id.*
differences in how he and the protocol viewed the risks to civilian lives; Reagan believed that Additional Protocol I would diminish the ability to distinguish combatants from civilian populations, and, therefore, the protocol would be quite a deviation from the traditional laws of war.  

A movement in this direction “would endanger civilians among whom terrorists and other irregulars attempt to conceal themselves. These problems are so fundamental in character that they cannot be remedied through reservations.”

American courts have relied on the structure that these agreements provided in order to establish the proper designation of combatants captured in the War on Terror and previous conflicts. Although designation between combatants and noncombatants is useful in prosecuting persons for violating the laws of war, the primary purpose for the distinction is the protection of civilian noncombatants.  

There has been pressure from the international community for the United States to adopt Additional Protocol I of the Geneva Conventions, but adoption of Additional Protocol I would “blur the line between combatant and noncombatant, to the very serious detriment of civilians.”

III. THE LIEBER CODE’S PURPOSE OF DISTINGUISHING PARTIES IS STILL RELEVANT TODAY

A. The Problem of Not Knowing Who the Enemy Is

The conflicts in Iraq and Afghanistan are between insurgents who hide themselves among the local inhabitants and conventional armed forces of the United States and partner nations. Under the “Basic Rule,” combatants are required to draw combat away from civilian populations, but the insurgents’ approach presents a situation whereby combatants are sometimes impossible to distinguish from noncombatants, and forces that try to abide by the laws of war are placed in an often indefensible position.

The problem of fighting an unidentifiable enemy is not just the result of a post-Saddam Hussein Iraq or a post-Taliban Afghanistan; before the fall of the regular Iraqi armed forces, the armed forces of the United States battled mainly against “irregular fedayeen fighters, not uniformed soldiers” and the Taliban.

60. Id.
61. Id.
65. Anderson, supra note 54, at 461.
66. Janin, supra note 2, at 82.
67. Id.
68. Id. at 84 (quoting Colin H. Kahl, How We Fight, 85 FOREIGN AFFAIRS 94, 95 (2006)).
fighters in Afghanistan similarly wore no uniforms or fixed insignias.69 In Iraq, the problem has become worse as the insurgents have grown accustomed to the tactics and rules of engagement that the United States military is required to follow; the insurgents routinely hide military supplies in mosques and hospitals, use civilian vehicles for combat operations, and attack civilians or military targets that are sure to have substantial civilian collateral damage.70 These actions were precisely what Francis Lieber would attribute to the war-rebel – “a renewer of war within an occupied territory.”71

Most any type of armed conflict will have its share of civilian casualties, but when the combatants disguise themselves as civilians, the risk to civilian populations greatly increases;72 the laws of war are intended to reduce the risks to noncombatants by requiring the belligerents to be identifiable and prevent the parties from arbitrarily shooting at any available target regardless of its status.73 “The level of compliance with the four Geneva Convention III, art. 4A fundamental criteria of lawful belligerency by parties to a conflict is inversely proportionate to the number of incidental civilian noncombatant casualties and the amount of other unintended collateral damage in warfare.”74 It is not hard to conclude that full compliance with the Geneva Conventions requirements would allow for easier identification of targets and less indiscriminate shooting, and, therefore, less civilian casualties.75

B. Belligerency Has Its Burdens and Privileges

Being recognized as a lawful combatant and to be given belligerent status has a combination of burdens and privileges: on the burden side, an identified belligerent can be attacked at any time, regardless of his current actions; but on the privilege side, if a combatant is recognized as a lawful belligerent, the captured combatant receives the protections accorded to the combatant by the Convention (III) Relative to the Treatment of Prisoners of War.76 Although this definition of combatant creates an “all-or-nothing proposition,” it allows for the combatant to either qualify for the privileges and immunities accorded to a lawful combatant, or it does not.77

When a fighter does not comply with the requirements of international law, at best the fighter may qualify only for the rights that are afforded a civilian, but the fighter may not be even eligible for that status.78 However, unlawful

69. Lindh, 212 F. Supp. 2d at 558.
70. Janin, supra note 2, at 84-85.
71. Guerrilla Parties, supra note 22, at 37.
73. Id. at 11.
74. Id. at 29.
75. Id.
76. GPW, supra note 50.
78. Id. at 213.
combatants may also be given inadvertent protections because of their status as unlawful combatants. Because signatories of the Geneva Conventions are forbidden from targeting civilians, unlawful combatants have a disincentive to distinguish themselves from civilians; the combatants continue to move in and out of the civilian population precisely because the civilian population is not attacked.79

Of the privileges that are afforded to combatants, immunity is of utmost importance.80 Immunity allows the combatant to avoid prosecution for actions that would normally be considered crimes in the time of peace (e.g. murder and the destruction of property).81 Besides immunity, a lawful belligerent must be treated as a prisoner of war to include: “repatriation after the war; specific limitation on living conditions; work requirements; correspondence and relief packages; and limitation on disciplinary and judicial proceedings.”82 When determining whether or not a combatant is entitled to immunity or prisoner of war status, United States courts have been consistent in using the combatant’s uniform as a qualifying factor.

IV. THE COURT SYSTEM’S HISTORIC USE OF UNIFORMS AS A DETERMINING FACTOR IN A COMBATANT’S STATUS

A. Ex parte Quirin

In the World War II era case Ex parte Quirin, the Supreme Court addressed the issue of whether enemy combatants could be tried by Military Commission.83 The case itself was the trial of eight conspirators who were dropped off by a German submarine for the purpose of bringing acts of war to United States soil.84 One of the key details of the case was the fact that when the eight petitioners disembarked from the submarine, they came ashore wearing German uniforms or parts of German uniforms.85 Once ashore, the German saboteurs removed all military identification and changed into civilian clothes.86 The Court was mainly concerned with whether the President had the constitutional authority to declare that unlawful combatants could be tried by a military commission, but a large portion of the case was dedicated to the determination of the status of the combatants and the historical documents that provided such guidance.87

79. Id.
80. Id. at 223.
81. Id.
82. Id.
83. Ex parte Quirin, 317 U.S. at 18.
84. Id. at 21.
85. Id.
86. Id.
87. "Hague Convention No. IV of October 18, 1907, 36 Stat. 2295, Article I of the Annex to which defines the persons to whom belligerent rights and duties attach, was signed by 44 nations. See, also, Great Britain, War Office, Manual of Military Law (1929) ch. xiv, §§ 17-19; German General Staff, Kriegsbrauch im Landkriege (1902) ch. 1; 7 Moore, Digest of International Law, §
After explaining the consequences associated with having their belligerency declared unlawful, the Court stated:

The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals.88

The Court adopted language that is very similar to that used by Lieber in Articles 83 and 84 of General Orders No. 100.89 The Court emphasized that there are laws of war that are universal and it is of paramount importance to distinguish those who may be targeted from those who may not.90 Although the Court was not required to analyze the status of these prisoners (the Court recognized that citizens of enemy nations were enemy individuals and Congress had provided jurisdiction for the military tribunals),91 it did devote a considerable amount of space in the decision discussing the merits of wearing a uniform while engaged in hostile acts. This devotion indicated that the Court concluded that the lack of a uniform is a key factor in determining that a combatant is unlawful.

B. Ahmad v. Wigen

In Ahmad v. Wigen, the United States District Court for the Eastern District of New York determined that a suspected terrorist’s rights to due process would not be violated if he were extradited to Israel, but the court also addressed the

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88. Id. at 30, n. 7.
89. See General Orders No. 100 art. 83, supra note 6, at 60 (“Scouts, or single soldiers, if disguised in the dress of the country or in the uniform of the army hostile to their own, employed in obtaining information, if found within or lurking about the lines of the captor, are treated as spies, and suffer death”), and art. 84 (“Armed prowlers, by whatever names they may be called, or persons of the enemy’s territory, 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.”). See also General Orders No. 100 art. 82, supra note 6, at 60 (“Men, or squads of men, who commit hostilities, whether by fighting, or inroads for destruction or plunder, or by raids of any kind, without commission, without being part and portion of the organized hostile army, and without sharing continuously in the war, but who do so with intermittant returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers - such men, or squads of men, are not public enemies, and, therefore, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates.”).
91. Id. at 27-28.
importance of obeying the laws of armed conflict.\textsuperscript{92} Testimony was given stating that the position of the United States is that “indiscriminate use of violence against civilian populations, innocent parties, is a prohibited act, and as such, is a common crime of murder . . . .”\textsuperscript{93} In order to accomplish this goal, there must be an emphasis on the importance of distinguishing combatant from noncombatant, and the court quoted Additional Protocol I stating that “[p]arties to the conflict shall at all times distinguish between civilian population and combatants . . . and accordingly shall direct their operations only against military objectives.”\textsuperscript{94} Although the United States did not ratify Additional Protocol I, it did recognize the provisions that were applicable to the customs of war and allow for the attacking of civilians “for such time as they take part in hostilities” as outlined in Article 51(3) of Additional Protocol I.\textsuperscript{95}

To show that Ahmad fell under the guise of being an unlawful combatant, the court cited the appropriate articles of the Geneva Conventions distinguishing civilians by requiring combatants to be subordinate to a commander, wear a distinctive insignia, carry arms openly, and to obey the laws of war.\textsuperscript{96} The court concluded that international laws of war were adopted with the intent to protect civilians and that extradition of the petitioner would not violate his due process rights.\textsuperscript{97} Again, as in \textit{Ex parte Quirin}, the court devoted analysis in distinguishing combatants from noncombatants for the purposes of protecting innocent lives, as opposed from the lives of the combatants, during combat operations. In dicta, the court stated that the United States’ refusal to ratify Additional Protocol I was because of the Protocol’s “characterization of wars of self-determination, and do not indicate disapproval of the Protocol’s protection of civilians.”\textsuperscript{98}

\textbf{C. United States v. Lindh}

In \textit{United States v. Lindh}, the United States District Court for the Eastern District of Virginia answered the question of whether a U.S. citizen who had taken up arms against the United States by joining and training with the military arm of the Taliban in Afghanistan could claim immunity as a lawful combatant.\textsuperscript{99} The court rejected Lindh’s argument for lawful combatant status by relying on the distinctive sign portion of the requirements for prisoner of war status: “it appears the Taliban typically wore no distinctive sign . . . ; they wore no uniforms or insignia and were effectively indistinguishable from the rest of the

\textsuperscript{92} Ahmad, 726 F. Supp. at 406.
\textsuperscript{93} Id. at 402.
\textsuperscript{94} Id.
\textsuperscript{95} Janin, supra note 2, at 8.
\textsuperscript{96} Ahmad, 726 F. Supp. at 406.
\textsuperscript{97} Id. at 407.
\textsuperscript{98} Id.
\textsuperscript{99} Lindh, 212 F. Supp. 2d at 552.
population. The requirement of such a sign is critical to ensure that combatants may be distinguished from the non-combatant, civilian population.”\textsuperscript{100} The court stated that the fact that the United States was a signatory of the Geneva Convention Relative to the Treatment of the Prisoners of War (GPW) was “controlling” in finding that Lindh was not entitled to immunity as a lawful combatant.\textsuperscript{101}

Although the court agreed that GPW was a self-executing treaty\textsuperscript{102} and the United States would be bound to give lawful combatants immunity for their actions, Lindh’s unlawful combatant status allowed the United States to prosecute him for his activities.\textsuperscript{103} Once again the court showed that wearing a uniform (or a “distinctive sign”) is a crucial element in determining the status of whether a belligerent is lawful or unlawful, and if an organization as a whole can be deemed unlawful, so can its members.\textsuperscript{104}

As can be seen in these three cases, the United States’ courts have regularly looked to the Geneva and Hague Conventions for guidance in determining the lawfulness of one’s belligerency. To adopt the additional Protocols of the Geneva Conventions in combating terrorism, particularly Additional Protocol I, would restrain nations that seek to comply with the laws of armed combat in a way that Francis Lieber would have found objectionable, and that the original signatories of The Hague and Geneva Conventions would have balked at.

V. BELLIGERENCY UNDER THE HAGUE AND GENEVA CONVENTIONS (WITH THE LIEBER CODE AS THEIR MODEL) AND ADDITIONAL PROTOCOL I

It is said that hindsight is twenty-twenty, but when predicting how Francis Lieber would have viewed the adoption of his ideas in international conventions on the laws of war, one is left to interpret ideas that may not have had the flexibility of understanding modern communication and travel and how they affect warfare (particularly when an insurgent war is considered). Francis Lieber required the wearing of a uniform for a person to be considered a lawful combatant and this requirement was further expanded in The Hague and Geneva Conventions, which allowed for the wearing of a distinctive emblem or insignia to distinguish combatants from noncombatants.\textsuperscript{105} The language in Additional Protocol I that Ronald Reagan found so disturbing is the language that would allow such a clear demarcation between the parties to become hopelessly distorted. Article 44 of Additional Protocol I expands the traditional definitions

\textsuperscript{100} Id. at 558.
\textsuperscript{101} Id. at 553.
\textsuperscript{102} “[T]reaties are self-executing under the Supremacy Clause of the U.S. Constitution (art. VI, § 2) if textually capable of judicial enforcement and intended to be enforced in that matter.” BLACK’S LAW DICTIONARY 1391 (8th ed. 2007).
\textsuperscript{103} Lindh, 212 F. Supp. 2d at 553.
\textsuperscript{104} Id. at 558.
\textsuperscript{105} The Hague II, supra note 26; GPW art. 4, supra note 50.
to now include language that states, “. . . combatants are obliged to distinguish themselves from the civilian population while engaged in attack” (emphasis added) . . . “. By allowing combatants (in most cases insurgents or terrorists) to only distinguish themselves in combat operations, Additional Protocol I puts civilian populations in danger by positioning combatants that are trying to engage in lawful combat in the situation of not having distinguishable targets.

As was shown in the cases cited in Part IV, the distinction between lawful combatants and civilian populations has traditionally been done through the use of uniforms. Additional Protocol I also provides that ununiformed combatants can maintain the status of a lawful combatant as long as “. . . he carries his arms openly . . . during each military engagement, and . . . during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.” It does not take much imagination to reason that an insurgent will only be armed when carrying out an attack and will make the utmost effort to disarm before becoming a target in a combat zone.

Without getting into an analysis of whether belligerents that are not part of a nation-state can ever be lawful combatants, one has to wonder how the courts using Additional Protocol I as their framework could make such a distinction unless persons were captured while actually in combat. In many U.S. court decisions, the courts have seemed to be more concerned with the procedures the combatants have, or do not have, available to them in challenging their

106. “1. Any combatant, as defined in Article 43, who falls into the power of an adverse Party shall be a prisoner of war. 2. While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a combatant of his right to be a combatant or, if he falls into the power of an adverse Party, of his right to be a prisoner of war, except as provided in paragraphs 3 and 4. 3. In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly: (a) during each military engagement, and (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate . . . 4. A combatant who falls into the power of an adverse Party while failing to meet the requirements set forth in the second sentence of paragraph 3 shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol. This protection includes protections equivalent to those accorded to prisoners of war by the Third Convention in the case where such a person is tried and punished for any offences he has committed. 5. Any combatant who falls into the power of an adverse Party while not engaged in an attack or in a military operation preparatory to an attack shall not forfeit his rights to be a combatant and a prisoner of war by virtue of his prior activities . . . 7. This Article is not intended to change the generally accepted practice of States with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to the conflict . . . .” Additional Protocol I art. 44, supra note 7.

107. Id.
detentions, than with making that determination themselves. But if one looks at the Additional Protocol I designation of combatant, do the outcomes of *ex parte Quirin*, *Ahmad v. Wigen*, and *United States v. Lindh* change?

A. Three Cases Revisited

In *Ex parte Quirin*, the Court devoted considerable space to the fact that none of the saboteurs wore a uniform or distinguishing insignia. The nature of operating behind the lines of the enemy necessarily would entail the combatant not to carry arms openly. In a case that led to a *per curiam* decision for the United States Supreme Court, the outcome is not as clear cut when viewed through the lens of Additional Protocol I. Looking at the same set of facts within the framework of the Lieber Code, the courts have had bright line rules to rely on. Article 82 states: “Men, or squads of men, who commit hostilities . . . without being part and portion of the organized hostile army . . . shall be treated summarily as highway robbers or pirates.” Furthermore, Article 83 adds those “. . . if disguised in the dress of the country . . . found within or lurking about the lines of the captor, are treated as spies, and suffer death.” Finally, Article 84 provides that “[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.” The outcome of the saboteurs would have been the same: of the eight saboteurs, six were sentenced to death. But the result is not so clear-cut using Additional Protocol I. One is left to wonder how a court would interpret the facts surrounding the capture of the saboteurs, given the fact that Additional Protocol I would only require combatants to carry their arms openly “during each military engagement.” Since the saboteurs were not captured while in a military engagement (they all either surrendered or were arrested without incident), the Court may have granted the saboteurs with the status of lawful combatants.

Using the same type of analysis for *Ahmad v. Wigen*, the court would have come to the same result using either the guidelines set forth by Dr. Lieber or the ones set forth by Additional Protocol I. Within that opinion, the court observed that the importance of distinguishing combatants from noncombatants was for

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110. *Id.* at 20.
111. General Orders No. 100 art. 82, *supra* note 6, at 60.
112. General Orders No. 100 art. 83, *supra* note 6, at 60.
113. General Orders No. 100 art. 84, *supra* note 6, at 60.
the protection of the civilian population. 117 Under Additional Protocol I, Ahmad would still be considered an unlawful combatant because he targeted civilians in terrorist attacks. 118 The Lieber Code brings about the same result – Article 23 provides the “[p]rivate citizens are no longer murdered . . . and the inoffensive individual is as little disturbed in his private relations as the commander of the hostile troops can afford to grant in the overruling demands of a vigorous war.” 119 And Lieber’s Article 47: “Crimes punishable by all penal codes, such as arson, murder, maiming, assaults . . . , if committed by an American soldier in a hostile country against its inhabitants, are not only punishable as at home, but in all cases in which death is not inflicted, the severer punishment shall be preferred.” 120 With Additional Protocol I and the Lieber Code placing emphasis on civilian lives, the two are in agreement.

In United States v. Lindh, the court relied on the fact that the Taliban did not comport with the recognized laws of war and, therefore, the Taliban forces were unlawful combatants. 121 By extension, any combatant fighting under the Taliban umbrella would also be an unlawful combatant. 122 Additional Protocol I seems to promote the type of warfare that the Taliban waged. The Taliban did not wear uniforms or wear a distinctive insignia, which would not be required under Additional Protocol I. Even when the Taliban carried their arms in the open, Afghanistan was a society that generally saw its populous carrying arms for protection. 123 To complicate matters even more, the Taliban had been considered the de facto government of Afghanistan from 1996 to 2001. 124 These criteria seem to indicate the Taliban fighters would be considered lawful combatants under Additional Protocol I and, therefore, Lindh would have that privilege extended to him as well (this is not taking into account whether or not he was in violation of other laws of the United States).

One could try to defend the Taliban as legal combatants under the Lieber Code by citing Article 51 which states that “people of that portion of an invaded

118. “In the conduct of military operations, constant care shall be taken to spare the civilian population . . . . [T]hose who plan or decide upon an attack shall . . . do everything feasible to verify that the objectives . . . are military objectives . . . ; take all feasible precautions . . . to avoiding . . . incidental loss or civilian life . . . ; refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life . . . ; an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one . . . or that the attack may be expected to cause incidental loss of civilian life . . . which would be excessive in relation to the concrete and direct military advantage anticipated; effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit . . . . No provision of this article may be construed as authorizing any attacks against the civilian population, civilians or civilian objects.” Additional Protocol I art. 57, supra note 7.
119. General Orders No. 100 art. 23, supra note 6, at 49.
120. General Orders No. 100 art. 47, supra note 6, at 54.
121. Lindh, 212 F. Supp. 2d at 558.
122. Id.
123. Bialke, supra note 3, at 31.
124. Id.
country which is not yet occupied by the enemy . . . at the approach of a hostile army, rise . . . en masse to resist the invader, they are now treated as public enemies, and, if captured, are prisoners of war.” Article 52 states: “No belligerent has the right to declare that he will treat every captured man in arms of a levy en masse as a brigand or bandit.” But in the instance of the Taliban, they were the de facto government, and their fighters (including al Qaeda) were not citizens rising in resistance to an invasion, but they were the Taliban’s equivalent of a standing army subject to the laws of war. Even if the Taliban fighters were recognized as the military arm of a government, their actions were what put them in the camp of unlawful combatants.

B. Al-Bihani v. Obama

Al-Bihani v. Obama is a unique case because it addresses whether or not a person in support of combat troops, but not a direct participant in combat operations, may be deemed an unlawful combatant. Like the cases in the War on Terror, this case dealt almost exclusively with the limits of presidential powers and the procedures used for challenging one’s combatant status, but Al-Bihani’s status is still an issue.

In Al-Bihani, the Court of Appeals for the District of Columbia affirmed an order that denied Al-Bihani’s petition for a writ of habeas corpus but still devoted space to address the appellant’s status. The two sides in this case provided an example of the widening interpretation of international law found under Additional Protocol I and the more narrow view that the United States maintains under the Geneva Conventions of 1949. This case is an illustration of the inevitable clash that results when the parties are in opposition in their interpretations of the laws and customs of war.

The facts of the case show that Ghaleb Nassar Al-Bihani was a member of the 55th Arab Brigade. The 55th Arab Brigade was a front line group in Afghanistan that included members of al Qaeda in its command structure. By all appearances, Al-Bihani was a cook’s assistant, but when he was captured, he was in possession of a firearm that was provided to him by al Qaeda.

Al-Bihani argued that under international law anyone who was not a member of the armed forces of the state military was a civilian, and a civilian must commit an overt act of hostility in order to be subject to detention (this argument seems to adopt Additional Protocol I’s position). In analyzing whether or not Al-Bihani was subject to detention, the court determined that he was an

125. General Orders No. 100 art. 51, supra note 6, at 55.
126. General Orders No. 100 art. 52, supra note 6, at 55.
128. Id.
129. Id.
130. Id.
131. Id. at 871.
unprivileged enemy belligerent. The Military Commissions Act of 2009 (MCA) defines an unprivileged enemy belligerent as “an individual (other than a privileged belligerent) who . . . has engaged in hostilities against the United States . . . has purposefully and materially supported hostilities . . . ; or . . . was a part of al Qaeda . . .”

It also defines a privileged enemy belligerent as “an individual belonging to one of the eight categories enumerated in Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War.”

Because Al-Bihani did not fit into the definition of a belligerent under The Hague Convention and was not entitled to Prisoner of War status under that Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War, the court relied on the MCA’s definition of unprivileged enemy belligerent using the prongs of having “purposefully and materially supported hostilities” and “was a part of al Qaeda.” Even though the MCA defines unprivileged enemy belligerent and privileged enemy belligerent within the scope of the Geneva Conventions, the court points out that these conventions have no controlling legal force of themselves; their legal force is given to them through statutes, such as the Military Commissions Act.

When taking the context of the definitions the MCA uses for unprivileged enemy belligerent and privileged enemy belligerent together, one can trace the origins all the way back to the Lieber Code. It has been demonstrated that Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War can be traced through The Hague Convention’s definition of a belligerent which, in turn, has its foundation in the Brussels Conference of 1874, which was influenced by the Lieber Code. Al-Bihani demonstrates that the courts are still more in line with Francis Lieber’s vision of the rules of warfare than with Additional Protocol I. Under Additional Protocol I, Al-Bihani would have found protection under Article 44 which provides “[a]ny combatant who falls into the power of an adverse Party while not engaged in an attack or in a military operation preparatory to an attack shall not forfeit his rights to be a combatant and a prisoner of war by virtue of his prior activities.” It would appear that even if Al-Bihani was a member of al Qaeda, that fact alone would not be enough to deprive him of his rights to being held as a prisoner of war. This is a case in which the MCA and Additional Protocol I demonstrate a direct conflict between the American courts and the additional Protocols to the Geneva Conventions. Al-Bihani’s actions fall within the MCA’s definition of supporting hostilities, therefore, he is an unlawful enemy combatant.

132. Id. at 872.
136. Al-Bihani, 590 F.3d at 871-72.
137. Root, supra note 39, at 456.
139. Al-Bihani, 590 F.3d at 872.
VI. CONCLUSION

In mid-February, 2011, rebels in Libya rose up against Muammar el-Qaddafi’s regime.140 Judging from the current news reports, the United States may find itself in the position of supporting the provisions of Additional Protocol I over its current interpretation of the laws of armed conflict. The rebel forces do not have much in the way of “command-and-control and no clear or consistent rules of engagement,” nor have they had proper training in the use of their weapons so they can “maximize their effectiveness while minimizing their risks to everyone else.”141 The rebels seem to be in direct violation of the Geneva Convention Relative to the Treatment of the Prisoners of War, Article 4 requirement of having a command structure and complying with the laws of war.142

The actions of the United States providing material and military support for the rebels in Libya143 seem to be more in line with Additional Protocol I’s declaration that “. . . there are situations in armed conflicts where . . . an armed combatant cannot so distinguish himself.” 144 In this instance, the United States’ foreign policy recognizes a foreign people’s right to self-determination, but it shows the country’s foreign policy is determined by circumstances and national interest, rather than a rigid set of rules. Although this is purely an academic argument (the United States is not going to prosecute itself for not complying with its current interpretations regarding armed conflict), it could lead to a situation in which future cases can point to the Libyan crisis as one in which the United States picked which laws of war it would follow. Without the formal adoption of Additional Protocol I and its codification by statute, a complete reversal of United States policy is unlikely to occur through these events, but it could lead a court to give less emphasis on the traditional requirements of a combatant’s status under The Hague and Geneva Conventions, thus making the law somewhat less predictable.

With combatants under Additional Protocol I having the ability to switch between combatant and noncombatant by the mere discarding of a weapon,145 Additional Protocol I departs from the model that Francis Lieber gave in 1863. Although Dr. Lieber held out rules of warfare that were to be complied with in order to avoid unnecessary civilian casualties, careful inspection of the Lieber

142. GPW art. 4, supra note 50.
144. Additional Protocol I art. 44, supra note 7.
145. Janin, supra note 2, at 87.
Code reveals that he was also a realist and understood that necessity in warfare trumps the protection of noncombatants.146

In the world of international agreements on armed conflicts, it is sometimes the case that even if a country is not a signatory to the treaty, once the country begins to comply with or act with approval of the treaty, other countries may hold them accountable to their actions.147 Although enforcing compliance with Additional Protocol I on the United States is extremely doubtful, the American court system, at times, seems to expand the limitations of the law. While engaged in a global war against terrorism, the United States needs the bright line rules found in The Hague and Geneva Conventions. These clear cut rules not only make it easier for the warring parties to identify each other for the purpose of military missions, but they also limit the amount of casualties inflicted on the civilian populations. Dr. Lieber saw the virtue of distinguishing the combatants from noncombatants in the Lieber Code, and the rationale of his work still applies today. As Francis Lieber wrote in Guerrilla Parties: “It requires the power of the Almighty and a whole century to grow an oak tree; but only a pair of arms, an ax, and an hour or two to cut it down.”148 The Lieber Code was written for the battlefield, but the scholar also recognized that war, as a necessary evil, could be the cause of permanent damage to the civilized world. The Lieber Code was written with a focus on the rules of combat with the purpose of preventing as little harm as possible to the civilian population; the bright lines that the Lieber Code established make the goal of minimizing harm to noncombatants a much more attainable goal than Additional Protocol I would allow.

146. “Military necessity admits of all direct destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable in the armed contests of the war; it allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or of peculiar danger to the captor; it allows of all destruction of property, and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy; of the appropriation of whatever an enemy’s country affords necessary for the subsistence and safety of the army, and of such deception as does not involve the breaking of good faith either positively pledged, regarding agreements entered into during the war, or supposed by the modern law of war to exist. Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God.” General Orders No. 100 art. 15, supra note 6, at 48.
148. Guerrilla Parties, supra note 22, at 34.