

Extraordinary Justice

By Peter Judson Richards, New York University Press, New York, 2007, 188 pages

Reviewed by Ronald W. Meister

In one of his more controversial actions following the attack on the World Trade Center, President Bush on November 13, 2001 issued an executive order authorizing the creation of the first military commissions in the United States in over fifty years. The other branches of government have since responded, the Supreme Court in *Hamdan v. Rumsfeld* holding the commissions' procedures to be unauthorized and defective, and Congress passing enabling legislation that clarified procedures and sought to insulate the commissions from *habeas* review. Six years after the attack, not a single case has been tried to conclusion. With decisions challenging the jurisdiction and procedures of the commissions still to come from the newly-minted Court of Military Commission Review and from the Supreme Court, it will likely be a long time before the legal issues spawned by the 2001 order are sorted out.

It is not too soon, however, for legal historians to try to put the little-understood institution of military commissions in context, or to seek lessons in past practice. In *Extraordinary Justice*, Peter Judson Richards, Associate Professor of Theology and the Law at the Southern Baptist Theological Seminary in Louisville, Kentucky, is one of the first to undertake this task.

Richards, whose only previous publication appears to be an article on the International Criminal Court co-authored for the *Naval War College Review*, is described as a former instructor at the United States Air Force Academy, a JAG Corps Lieutenant Colonel, and Director of his seminary's Center for Law and Theology, an entity not to be found by traditional search engines. Wherever he acquired his experience, he is well-informed about the modern history of military tribunals, and provides a timely work of history and a provocative thesis about their role, which he sees not as a dispenser of justice but as an auxiliary to the application of military force.

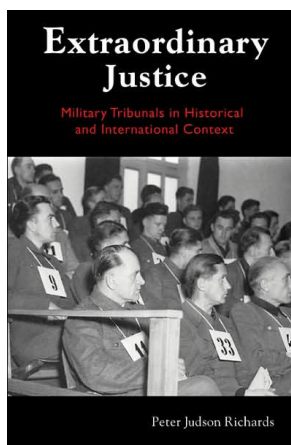
Extraordinary Justice divides itself into two parts, the first historical, the second polemical. The first is more helpful. In an illuminating, though selective, survey, Richards traces the use of military commissions – by which he means extraordinary national (but not international) military bodies established for the purpose of punishing convicted wrongdoers in times of emergency – throughout U.S. history as well as in the Boer War and World War I. He provides informative descriptions of several of the more notorious commission trials, including those of Andersonville Commandant Henry Wirz, British nurse Edith Cavell, the South Australian Mounted Rifleman Harry (“Breaker”) Morant, and the Japanese General Tomoyuki Yamashita, all of whom were executed. He also turns up some little-known episodes, including the “Dakota trials” of native Americans during the Civil War, which imposed no fewer than 303 death sentences (the vast majority of which were commuted or pardoned by President Lincoln), and the trials of U.S. Army offenders by military tribunals in the Mexican War.

Richards' discussion of French practice is of particular interest. Unlike Anglo-American institutions, French *conseils de guerre* are a

pre-existing, parallel, but dormant system of tribunals, taken out of the attic when the legislature declares a formal *état de siège* or *état d'urgence* as part of broader restrictions on freedom of expression, expansions of search and seizure, and transfers of power to the executive. It may strike some as ironic that, in his own desires to restrain individual liberties, expand surveillance and establish military tribunals, President Bush interprets Congress's September 2001 Authorization for Use of Military Force as if it were modeled on the rules of the despised French.

Common to all of Richards' historical examples is the concept of “crisis government,” a need to improvise rules tailored to emergency situations, when the executive is freer to promote its own concepts of public safety and order, and in which what Alberto Gonzales might describe as the “quaint” guarantees of the Bill of Rights “fail the test of relevance.” Richards shows that such a re-ordering of Constitutional priorities was not invented by Karl Rove or John Yoo. Over two hundred years ago, Alexander Hamilton, in *The Federalist* No. 8, contended that, “The circumstances that endanger the safety of nations are infinite; and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed.” Abraham Lincoln, President of the United States but not of the American Civilwar Liberties Union, argued to the same effect in countenancing military trials of almost 14,000 defendants, including an Episcopal minister who habitually omitted the prayer for the President required by the church service.

It is when Richards ventures into the polemical essay that occupies the second portion of his book, in which he purports to apply the lessons of history in the present context, that he betrays his prejudices. He strongly implies that the threatened trials of Guantanamo prisoners (which have yet to occur) have protected the American public from further acts of terror, and he is therefore highly critical of federal court involvement in what he sees as a purely executive function. Finding little or no purpose in the tribunals other than as an adjunct of military force, he disparages in turn fairness, justice, openness, defense counsel, an independent judiciary, the Constitution, and, ultimately, the rule of law itself. Referring with heavy sarcasm to “the heroic criminal defense lawyer,” he concludes of the Guantanamo prisoners that “belligerent actions of pirates and marauders remove them from the protections bestowed by the laws of war” – thereby begging the questions whether they are in fact pirates or marauders, whether they have committed belligerent acts, and whether they are to have any forum in which to establish who they are and what they have done. For Richards, the needs of military force render the executive's determination unimpeachable. In his unwillingness to value any other goal, he refuses to concede that this country should apply standards any higher than those of our most lawless enemies, leaving us to wonder whether it is the Law or the Theology of his academic department that leads him to these conclusions.



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