

Military Tribunals: A Sorry History

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*After 9/11, President George W. Bush authorized the creation of military tribunals to try those who assisted in the terrorist attacks on New York City and Washington, DC. His military order closely tracked the model established by President Franklin D. Roosevelt, who appointed a military tribunal in 1942 to try eight German saboteurs. In *Ex parte Quirin* (1942), the Supreme Court unanimously upheld Roosevelt's tribunal. The Bush administration relies heavily on this judicial precedent, but military tribunals in U.S. history have generally been hostile to civil liberties, procedural due process, and elementary standards of justice.*

On November 13, 2001, President George W. Bush authorized a military tribunal to try whoever provided assistance for the terrorist attacks of September 11 against New York City and Washington, DC. Vice President Dick Cheney supported Bush's initiative by arguing that terrorists, because they are not lawful combatants, "don't deserve to be treated as a prisoner of war." He spoke favorably of the treatment of German saboteurs in 1942, who were "executed in relatively rapid order" (Bumiller and Myers 2001, B6). The concept of a military tribunal had been developed by William P. Barr, former attorney general in the first Bush administration. Barr's previous position with the Justice Department, as head of the Office of Legal Counsel (OLC), put him in the same space occupied by the 1942 military tribunal. He said that the idea of a tribunal came to him as one way to try the men charged with blowing up the Pan Am jetliner over Lockerbie, Scotland (*ibid.*). In an op-ed piece with Andrew G. McBride, Barr referred to the Supreme Court's decision in *Ex parte Quirin* (1942), upholding the military tribunal for the German saboteurs, as the "most apt precedent" (Barr and McBride 2001, B7).

A closer look at the 1942 experience rebuts the notion that the Nazi saboteur case is a reliable or attractive precedent. The Roosevelt administration was so torn by its handling of the case that it adopted an entirely different procedure in 1945 to deal with two other German spies. In general, efforts in time of war to replace civilian courts with military tribunals have produced serious deficiencies in law, practice, and institutional

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checks. With the November 13 order on military tribunals, the Bush administration has attempted to augment presidential power at the cost of legislative and judicial controls.

Military Tribunals

Military tribunals have been used for centuries to try individuals of offenses when civil courts are either not open or considered not suitable. Tribunals are most justified when civil courts are unavailable or not functioning, and least justified when they are. In the case of the eight Germans tried in 1942, they were charged with four crimes: one against the “law of war,” two against the Articles of War (81st and 82nd), and one involving conspiracy. The prosecutors thus combined a mix of offenses that were non-statutory (law of war) and statutory (Articles of War).

The distinction here is fundamental. In federal law, the creation of criminal offenses is reserved to the legislative branch, not to the president. The Constitution vests in Congress the power to “constitute Tribunals inferior to the supreme Court” and to “define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations” (Art. I, § 8, cl. 9 & 10). By enacting the Articles of War, Congress defined not only the procedures but also the punishments for the field of military law. Charging individuals with violations of the “law of war” shifts the balance of power from Congress to the executive.

In enacting Articles of War, Congress depended on British precedents dating back to the 1650s. Parliament amended those Articles in 1749 and again in 1757. The purpose of the Articles was to set down penalties for various acts by soldiers and sailors and to establish procedures for courts-martial. Punishments were meted out for failure to obey orders, mutinous practices, and other conduct that required discipline. When George Washington served as an officer in the American colonies under British rule, it was his duty to have these Articles of War read to recruits. He was also responsible for supervising general courts-martial and approving the sentences that were handed down (Fisher 2003, 59-60).

American Precedents

In 1775, with the American colonies preparing to declare independence from England, the Continental Congress adopted rules and regulations for the military, drawing principles of warfare from the British Articles of War (Journals of the Continental Congress, 2: 111-23). In 1780, in the midst of the war against England, American soldiers apprehended Major John André, a British officer captured at night “in a disguised habit” (Washington 1937, 20: 101). General Washington did not want André “treated with insult,” but by substituting civilian clothes for his military uniform “he does not appear to stand upon the footing of a common prisoner of war and therefore he is not entitled to the usual indulgences they receive” (*ibid.*, 87). André was tried by military commission and hanged as a spy (Sargent 1871, 344-96).

After ratification of the U.S. Constitution, one of the first actions of the new Congress was to pass legislation in 1789 stating that military troops “shall be governed by the rules and articles of war which have been established by the United States in Congress assembled, or by such rules and articles of war, as may hereafter by law be established” (1 Stat. 96, § 4). In 1806, in the exercise of this legislative authority, Congress established “Rules and Articles for the Government of the Armies of the United States.” The statute consisted of 101 articles. For example, under Article 87, no person “shall be sentenced to suffer death, but by the concurrence of two-thirds of the members of a general court-martial” (2 Stat. 368). At the time of the Nazi saboteur case, the penalty of death required a unanimous vote of a court-martial. The 1806 statute, reflecting the André precedent, also provided that in time of war, “all persons not citizens of, or owing allegiance to the United States of America, who shall be lurking as spies, in or about the fortifications or encampments of the armies of the United States, or any of them, shall suffer death, according to the law and usages of nations, by sentence of death” (2 Stat. 372, Art. 101[2]).

Throughout these early decades, it was recognized that the constitutional authority to create and regulate military tribunals lay with Congress, not the president. In 1818, Attorney General William Wirt issued a legal memorandum regarding the source of authority to order new trials before courts-martial. He said it was a “clear principle” that the president has no powers except those derived from the Constitution and U.S. laws. The president was commander in chief, but, “in a government limited like ours, it would not be safe to draw from this provision inferential powers, by a forced analogy to other governments differently constituted.” Wirt concluded: “the President is the national and proper depository of the final appellate power, in all judicial matters touching the police of the army; but let us not claim this power for him, unless it has been communicated to him by some specific grant from Congress, the fountain of all law under the constitution” (1 Op. Att’y Gen. 234).

Deference toward congressional authority is also evident in the experience with military tribunals during the war against Mexico, when American forces found themselves in a foreign country without a suitable judicial system to try offenders. On February 19, 1847, General Winfield Scott announced that certain acts committed by civilians or military persons would be tried before military commissions. He was particularly concerned about the behavior of “the wild volunteers,” who, “as soon as beyond the Rio Grande, committed, with impunity, all sorts of atrocities on the persons and property of Mexicans” (Scott 1864, 2: 392). To “suppress these disgraceful acts abroad,” he issued a martial law order “until Congress could be stimulated to legislate on the subject” (*ibid.*, 393).

Thus, Scott never questioned the ultimate authority of Congress to control military tribunals. Under Scott’s order, “all offenders, Americans and Mexicans, were alike punished—with death for murder or rape, and for other crimes proportionally.” His order also provided for a special American tribunal “for any case to which an American might be a party” (*ibid.*, 395). Scott’s military commission represented a mix of executive and legislative authority. Every military commission “will be appointed, governed,

and limited, as nearly as practicable, as prescribed by the 65th, 66th, 67th, and 97th, of the said rules and articles of war" (ibid., 544).

The next experiment with military tribunals came in 1862, when the Dakota community in Minnesota reacted to years of grievances by initiating hostilities against American settlers. Five weeks of fighting resulted in the deaths of 77 American soldiers, 29 citizen-soldiers, approximately 358 settlers, and an estimated 29 Dakota soldiers (Chomsky 1990, 21-22). The U.S. army created a five-member military commission to investigate the incidents and pass judgment. All members of the commission had fought in the war with the Dakota (ibid., 24). The trials, which began on September 28 and concluded on November 3, considered charges against 392 Dakota, "with as many as 42 tried in a single day" (ibid., 27). The commission convicted 323 and recommended that 303 be hanged.

President Abraham Lincoln, learning of the trials on October 14, directed that no executions be made without his approval. Federal law, in fact, made that a requirement. For all courts-martial and military commissions, "no sentence of death, or imprisonment in the penitentiary, shall be carried into execution until the same shall have been approved by the President" (12 Stat. 598, § 5). Lincoln ordered that the trial transcripts be submitted to him for review. Out of the 303 recommended for execution, Lincoln ordered the death sentence for 39 and commuted or pardoned the remainder (U.S. Senate 1862, 2, 6-7). After additional evidence cast doubt on the guilt of one of the accused, 38 were executed.

Several other military tribunals operated during the Civil War. In the case of Clement L. Vallandigham, charged with expressing sympathy for the South, the Supreme Court held it had no jurisdiction to review the proceedings of a military commission.¹ Only after the war did the Court, in *Ex parte Milligan* (1866), rule that the laws and usages of war can never be applied to citizens in states where the civilian courts are open and their process unobstructed.² The *Milligan* decision would be revisited by the Court in 1942 when it decided the Nazi saboteur case.

Another Civil War case involved the military tribunal appointed to hear charges of conspiracy and murder against eight Southerners who administered the Andersonville prison, "a name that has come to stand for human misery wrought by war" (Laska and Smith 1975, 68). Thousands of Union soldiers died from overcrowding, sun exposure, lack of food, polluted water, and disease. After Lincoln's assassination, public support for mercy toward the South was replaced "by a demand for vengeance," not only against those who conspired against Lincoln "but against all the former leaders of the Confederacy" (ibid., 83). This emotion was directed against Captain Henry Wirz, the former commandant of Andersonville and the only American tried and executed as a war criminal. Although there was evidence that Wirz had tried to improve the conditions of prisoners "with the few resources diverted to him from the main war effort" (ibid., 115), he was found guilty and hanged.

1. *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243 (1864).

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

The most controversial military commission connected with the Civil War is the trial of those charged with the assassination of President Lincoln. On May 1, 1864, President Andrew Johnson ordered nine military officers to serve as a commission to try the suspects. Of the seven men and one woman brought before the commission, four were given prison sentences and four sentenced to death by hanging. After President Johnson approved the recommendations, the four—including Mary E. Surratt—were hanged in public. Commentary on these trials has generally been critical of the appearance of prejudgment and the spirit of vengeance (Hanchett 1986; Trindal 1996; Johnston 2001, F1).

Edward Bates, who served as attorney general under Lincoln from 1861 to 1863, regarded the tribunal as a great mistake: “Such a trial is not only unlawful, but it is a gross blunder in policy: It denies the great, fundamental principle, that ours is a government of *Law*, and that the law is strong enough, to rule the people wisely and well; and if the offenders be done to death by that tribunal, however truly guilty, they will pass for martyrs with half the world” (Beale 1933, 483). Bates objected to military tribunals because the people who serve “are selected by the military commander *from among his own subordinates*, who are bound to obey him, and responsible to him; and therefore, they will, commonly, find the case as required or desired by the commander who selected them” (ibid., 502).

A similar point appears in some of the cases decided by federal courts after the Civil War. In 1866, a circuit court held that a conviction decided by a military commission was illegal because of a lack of jurisdiction. The trial took place seven months after the South had surrendered and was conducted under “martial law,” which the court defined as “neither more nor less than the will of the general who commands the army. It overrides and suppresses all existing civil laws, civil officers and civil authorities, by the arbitrary exercise of military power; . . . Martial law is regulated by no known or established system or code of laws, as it is over and above all of them. The commander is the legislator, judge and executioner.”³

Although the Court’s decision in *Milligan* seemed to rule that citizens could not be tried by military tribunals when civilian courts were open and operating, military tribunals continued to function in the South under martial law. From the end of April 1865 to January 1, 1869, 1,435 trials by military commission took place, and others occurred in Texas and Mississippi in 1869 and 1870 (Neely 1991, 176-77).

Between the Civil War and World War II, there was little activity with military tribunals. During World War I, Lothar Witzke (under the alias Pablo Waberski) entered the United States as a German spy (Landau 1937, 116-28). An opinion by Attorney General Thomas W. Gregory in 1918 concluded that Witzke could not be tried by a military tribunal because he had been apprehended in U.S. territory not under martial law, and had not entered any camp, fortification, or other U.S. military premises (31 Op. Att’y Gen. 356). A year later, Attorney General A. Mitchell Palmer reversed Gregory on the basis of new facts, but Palmer’s opinion was not made public until July 29, 1942 (40 Op. Att’y Gen. 561).

3. In re Egan, 8 Fed. Cas. 367 (C.C. N.Y. 1866; Case No. 4,303).

Two FDR Tribunals

In June 1942, eight German saboteurs came to the United States by submarine, intent on using explosives against railroads, factories, bridges, and other strategic targets. One of the Germans, George John Dasch, turned himself in to the Federal Bureau of Investigation (FBI) and helped the agency round up the others (Fisher 2003, 32-42). President Roosevelt issued Proclamation 2561 on July 2, 1942, to create a military tribunal (7 Fed. Reg. 5101). The initial paragraph began by stating that the “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.” Reference to “law of war” was crucial. Had Roosevelt cited the “Articles of War,” he would have triggered the statutory procedures established by Congress for courts-martial. The category “law of war,” undefined by statute, represents a more diffuse collection of principles and customs developed in the field of international law.

The second paragraph of the proclamation described Roosevelt acting as “President of the United States of America and Commander in Chief of the Army and Navy of the United States, by virtue of the authority vested in me by the Constitution and the statutes of the United States.” Thus, Roosevelt was not claiming inherent or exclusive constitutional authority. He acted under a mix of constitutional authority accorded to the president and statutory authority granted by Congress. The second paragraph contained a controversial provision that denied the eight men access to any civil court: “such persons shall not be privileged to seek any remedy or maintain any proceeding directly or indirectly, or to have any such remedy or proceeding sought on their behalf, in the courts of the United States, or of its States, territories, and possessions, except under such regulations as the Attorney General, with the approval of the Secretary of War, may from time to time prescribe.”

Also on July 2, 1942, Roosevelt issued a military order appointing the members of the military commission, the prosecutors, and the defense counsel (7 Fed. Reg. 5103). He appointed seven generals to sit on the tribunal, and directed Attorney General Francis Biddle and Judge Advocate General Myron C. Cramer to conduct the prosecution. The military order assigned two colonels, led by Kenneth Royall, to serve as defense counsel. In directing the commission to meet on July 8, “or as soon thereafter as is practicable,” Roosevelt’s order referred to the trying of offenses against both the “law of war and the Articles of War.” However, the order clearly liberated the commission from some of the restrictions established by Congress in the Articles of War. The commission would “have power to and shall, as occasion requires, make such rules for the conduct of the proceeding, consistent with the powers of military commissions under the Articles of War, as it shall deem necessary for a full and fair trial of the matters before it.” The power to “make such rules” freed the commission from procedures enacted by Congress and the *Manual for Courts-Martial*. The commission could admit evidence “as would, in the opinion of the President of the Commission, have probative value to a reasonable man.” The meaning of the reasonable-man

test would be worked out over the course of the trial as the commission issued its rulings.

Roosevelt's military order departed from the Articles of War with regard to the votes needed for sentencing. The order stated that the concurrence of "at least two-thirds of the members of the Commission present shall be necessary for a conviction or sentence." Two-thirds of the commission could convict and sentence the men to death. Under a court-martial, a death penalty required a unanimous vote.

Finally, Roosevelt's order directed that the trial record, including any judgment or sentence, be transmitted "directly to me for my action thereon." This, too, marked a significant departure from military trials. Under Articles of War 46 and 50 $\frac{1}{2}$, any conviction or sentence by a military court was subject to review within the military system, including the judge advocate general's office. The July 2 order vested the "final reviewing authority" in Roosevelt and took Judge Advocate General Cramer out of the reviewing function and joined him with Biddle as prosecutor.

The 1942 Trial

The military tribunal met from July 8 to August 1. Toward the end of the trial, Col. Royall took the matter to civil court, where he petitioned for a writ of habeas corpus to challenge the jurisdiction of the tribunal. The Supreme Court had already agreed to schedule oral argument, beginning on July 29, even though no action had yet been taken by the lower courts. On the evening of July 28, at 8 p.m., the district court turned down Royall's petition.⁴ When oral argument began at noon the next day, the Justices asked how the case could be before the Court without action by the DC Circuit. Royall promised to do what he could in getting the proper papers before the appellate court. The briefs from both sides were dated on the first day of oral argument, indicating how little prepared the justices were to decide a matter of military law largely foreign to them.

One of the first issues confronting the Court was whether some justices needed to recuse themselves because of personal interests. Justice Frank Murphy had already disqualified himself because of his status as an officer in the military reserves. Chief Justice Harlan Fiske Stone had a problem: his son, Lauson, was part of the defense team. Biddle assured Stone that there was no need to remove himself from the case, noting that his son did not participate in the habeas corpus proceedings. Stone asked the defense whether it concurred with Biddle's view, and Colonel Royall answered "We do" (Landmark Briefs 1975, 496-97).

Stone was not the only justice with a cloud over his head. Felix Frankfurter frequently stopped by the administration to share his views with President Roosevelt and other top officials. On June 29, two days after the eight Germans had been rounded up, Frankfurter told Secretary of War Henry L. Stimson over dinner that the contemplated military commission should be composed entirely of soldiers, with no civilians included.

4. *Ex parte Quirin*, 47 F.Supp. 431 (D.D.C. 1942).

Long before the Court had assembled to hear the case, Frankfurter had already staked out a position that favored the government. For months, Justice James F. Byrnes had been serving as a *de facto* member of the Roosevelt administration, working closely with Roosevelt and Biddle on the war effort. Biddle wrote a series of “Dear Jimmie” letters, asking Byrnes for advice on draft executive orders, a draft of the Second War Powers Bill, and requesting him to intervene to get bills out of committee and onto the floor for passage (Fisher 2003, 95-96). Despite their personal involvement, Frankfurter and Byrnes participated in the case.

The Supreme Court proceeded to hear oral argument for nine hours over a two-day period. On the third day, just before the Court was about to issue its decision, the papers came over from the DC Circuit. The Court granted cert and released a short *per curiam*, upholding the jurisdiction of the military tribunal. The *per curiam* promised a “full opinion” that would set forth the legal reasoning. It took the Court three months to craft a decision that would avoid any concurrences or dissents, even though the justices were well aware that Roosevelt had violated several Articles of War (Fisher 2003, 109-17). In the first week of this drafting process, the tribunal completed its work and found all eight Germans guilty as charged. Six were electrocuted on August 8 and two given prison terms.

With six dead, the Court’s full opinion issued October 29 could hardly imply that the *per curiam* rested on shaky legal grounds or that the administration had not acted with adequate authority. The Court distinguished between “lawful combatants” (uniformed soldiers) and “unlawful combatants” (enemies who enter the country in civilian dress). The former, when captured, are detained as prisoners of war. The latter, said the Court, are subject to trial and punishment by military tribunals. Although the Court declined to address whether one of the Germans, Herbert Haupt, was a U.S. citizen, it made it clear that U.S. citizenship of an enemy belligerent did not entitle the person to a civilian trial. A U.S. citizen who associates himself with the military arm of an enemy government, and enters the United States for the purpose of committing hostile acts, is an “enemy belligerent” subject to the jurisdiction of a military tribunal.

Evaluating the Decision

The saboteur case of 1942 represented an unwise and ill-conceived concentration of power in the executive branch. President Roosevelt appointed the tribunal, selected the judges, prosecutors, and defense counsel, and served as the final reviewing authority. The generals on the tribunals, the colonels serving as defense counsel, and the two prosecutors (Biddle and Cramer) were all subordinates of the president. “Crimes” related to the law of war came not from the legislative branch, enacted by statute, but from executive interpretations of the “law of war.” Throughout the six weeks of the trial by military tribunal and the habeas corpus petition to the Supreme Court, Congress was not a participant. The judiciary was largely shut out as well. The two days of oral argument before the Court were dramatic and newsworthy but hardly represented a check on presidential power. There was little expectation that the Court would do anything other than what it did: deny the petition for a writ of habeas corpus.

The purpose of trying the eight Germans in secret was not to protect military secrets or to safeguard national security. The need for secrecy was driven by two reasons: to conceal the fact that Dasch had turned himself (and the others) in, and to mete out heavier penalties. In civil court, the maximum penalty would have been about three years. Roosevelt was determined to have the Germans put to death. Most of the trial could have been conducted openly, with the public and the press invited, without sacrificing any legitimate national interests. On the rare occasions when sensitive data might have been revealed, the courtroom could have been cleared for that part of the testimony.

Roosevelt's creation of the military tribunal was deeply flawed. It was an error to authorize the tribunal to "make such rules for the conduct of the proceeding, consistent with the powers of military commissions under the Articles of War, as it shall deem necessary for a full and fair trial of the matters before it." Procedural rules need to be agreed to before a trial begins, not after. No confidence can be placed in rules created on the spot, particularly when done in secret by generals who serve under the president. It would have been better for the military tribunal to operate under the procedures set forth in the Articles of War and the *Manual for Courts-Martial*. Those procedures were in place and represented the product of mature thought and careful study over a long period of time. With their statutory base, they would have given congressional sanction to the process and removed the impression of executive arbitrariness.

Assembling the Court in the middle of the summer in emergency session, with briefs hurriedly prepared and read, sent a message of inconsiderateness, not careful judicial deliberation. Nine hours of oral argument highlighted the lack of preparation. Taking the case directly from the district court, without intervening review by the DC Circuit, further underscored the rush to judgment. The reasons and analysis that eventually found their way into the full opinion, strained and uninformed in many places, were compromised by the political situation the Court found itself in. It had to make a decision without knowing how the secret trial was being conducted and how it would turn out. The justices knew that information unavailable to them would be released within a few years, putting the Court's reputation at risk. Nothing in the decision could imply, in any way, that there had been a miscarriage of justice, but precisely that judgment would be reached once experts in military law began to evaluate the Court's work (Fisher 2003, 128-38).

Wiener's Analysis

The most penetrating critique of *Quirin* was prepared by Frederick Bernays Wiener, Frankfurter's former student at Harvard Law School. The Court's decision sufficiently troubled Frankfurter that he asked Wiener, by now an expert on military law, to share his thoughts about the Court's ruling. Wiener prepared three analyses: the first on November 5, 1942, the next on January 13, 1943, and the final on August 1, 1943 (Wiener 1942-43). Each letter found serious deficiencies with the Court's work.

The first letter credits the Court for taking "the narrowest—and soundest—ground" by holding that the eight saboteurs were war criminals (or unlawful belliger-

ents) as understood in international law, and that violators of the laws of war are not entitled, under the Constitution, to a jury trial. Still, he criticized the Court for creating confusion about the scope of the Articles of War and how they relate to military commissions. Weaknesses in the decision flowed “in large measure” from the administration’s disregard for “almost every precedent in the books” when it established the military tribunal.

Wiener, complimenting the Court for confronting some of the “extravagant dicta” in the majority’s opinion in *Milligan*, thought the Court was correct in treating Haupt’s citizenship as irrelevant in deciding the tribunal’s jurisdiction to try him. Yet Wiener objected to the Court’s “careless or uninformed handling” of the Articles of War. During the Civil War, he said, military commissions had repeatedly and improperly assumed jurisdiction over offenses better handled by courts-martial. The fact that President Roosevelt had appointed the commission did not give it a free charter. If the president appointed a general court-martial, Wiener said, it would still be subject to the provisions of the Articles of War. Presidential appointment did not make a tribunal “immune from judicial scrutiny.”

To Wiener, it seemed “too plain for argument” that Article of War 46 required that the trial record of the tribunal be reviewed either by the staff judge advocate or the judge advocate general before final action by the president. He denied that Roosevelt’s actions were justified under his powers as commander in chief, or by invoking implied or inherent executive authority. He flagged other problems. Military commissions were normally appointed by War Department Special Orders, not by presidential proclamation or military order. He found only one precedent of using the judge advocate general of the Army as prosecutor, and it was one “that no self-respecting military lawyer will look straight in the eye: the trial of the Lincoln conspirators.” Even in that sorry precedent, “the Attorney General did not assume to assist the prosecution.”

Notwithstanding procedural errors and the “flagrant disregard” of the Articles of War, Wiener concluded that there was no justification for issuing the writ of habeas corpus and moving the trial from the tribunal to a civil court. He thought the saboteurs could have been tried better either by commissions appointed by the commanding generals of New York and Florida, or by a military commission operating under the limitations of a general court-martial.

In his other two letters, Wiener reiterated his position that the eight Germans, coming into U.S. territory in civilian clothes as unlawful belligerents, had no constitutional right to a jury trial. He referred to testimony before Congress in 1916 by Brig. Gen. Enoch H. Crowder, Judge Advocate General of the Army from 1911 to 1923, who explained the use of courts-martial and military commissions in time of war. Crowder concluded that “Both classes of courts have the same procedure” (U.S. Senate 1916, 40). Congress did not intend military tribunals to dream up their own rules and regulations. However, Roosevelt’s proclamation authorized the military tribunal to depart from those procedural safeguards whenever it decided it was appropriate or necessary.

These letters from Wiener must have had an impact on Frankfurter. In 1953, when the Court was considering whether to sit in summer session to hear the espionage case of Ethel and Julius Rosenberg, someone recalled that the Court had sat in summer

session in 1942 to hear the saboteur case. Frankfurter wrote: “We then discussed whether, as in *Ex parte Quirin*, 317 U.S. 1, we might not announce our judgment shortly after the argument, and file opinions later, in the fall. Jackson opposed this suggestion also, and I added that the *Quirin* experience was not a happy precedent” (Frankfurter 1943, 8). In an interview on June 9, 1962, Justice Douglas made a similar comment: “The experience with *Ex parte Quirin* indicated, I think, to all of us that it is extremely undesirable to announce a decision on the merits without an opinion accompanying it. Because once the search for the grounds, the examination of the grounds that had been advanced is made, sometimes those grounds crumble” (Douglas 1962, 204-205).

As Wiener noted, it was a mistake to have the judge advocate general share prosecutorial duties with the attorney general. The judge advocate general adds integrity to the system of military justice by serving as a reviewing authority, not as a prosecutor. Whatever the military tribunal decided should have come for review to the judge advocate general and his staff, acting in an independent capacity, and then to the president for possible clemency. The trial record of 3,000 pages should never have gone directly to Roosevelt. Neither Roosevelt nor any other president is in a position to read a transcript of that length with the requisite care, independence, and legal judgment. Within a few years the administration would have a second chance to get it right.

The Second Submarine in 1944

In 1944, Nazi Germany brought two more saboteurs to the United States by submarine (Fisher 2003, 138-44). Two men reached the coast of Maine on November 29, 1944. Unlike the eight saboteurs in 1942, they brought no explosives with them. Their primary mission was to purchase a short-wave radio and transmit intelligence back to Germany. Like the eight Germans, they had a falling out and were picked up by the FBI in New York City, one on December 26 and the other four days later.

Initially, it appeared that the two men would be tried in the same manner as the eight Nazi agents in 1942: by a military tribunal sitting on the fifth floor of the Justice Department in Washington, DC. Biddle, along with Cramer, was ready to conduct the prosecution. However, Secretary of War Stimson, who thought it had made no sense for Biddle and Cramer to act as prosecutors in 1942, this time intervened forcefully to block their participation. Stimson told Roosevelt that the men should be tried either by court-martial or military commission, with the appointment authority placed in the army commander in Boston or in New York. In his diary, Stimson expressed contempt for Biddle’s grandstanding: “It is a petty thing. That little man is such a small little man and so anxious for publicity that he is trying to make an enormous show out of this performance—the trial of two miserable spies. The President was all on my side but he may be pulled over” (Stimson 1945).

Stimson prevailed. On January 12, 1945, Roosevelt issued a military order to try the two German spies. Unlike his military order of July 2, 1942, he did not name the members of the tribunal or the counsel for the prosecution and defense. Instead, he empowered the commanding generals, under the supervision of the secretary of war, “to appoint military commissions for the trial of such persons.” Moreover, the trial record

would not go directly to the president, as in 1942. The review would be processed within the judge advocate general's office: "The record of the trial, including any judgment or sentence, shall be promptly reviewed under the procedures established in Article 50^{1/2} of the Articles of War" (10 Fed. Reg. 548).

Appointments to the seven-man tribunal were made by Maj. Gen. Thomas A. Terry, commander of the Second Service Command. He also selected the officers to serve as prosecutors and defense counsel. In addition to the military personnel, two members from the Justice Department assisted with the prosecution. Biddle had no role as prosecutor and Cramer was limited to his review function within the JAG office. The trial took place not in Washington, DC, but at Governors Island, New York City (Fisher 2003, 143).

On February 14, 1945, the tribunal sentenced the two men to death by hanging. The verdicts and sentencing went to General Terry, as the appointing officer, and from there to the judge advocate general's office. President Roosevelt died on April 12, before the executions could be carried out. On May 8, President Harry Truman announced the end of the war in Europe. The following month, he commuted the death sentences for the two men to life imprisonment. In 1955, the U.S. government released one of the men, Erich Gimpel, and deported him to Germany. The other person, William Colepaugh, tried unsuccessfully to initiate a habeas corpus action from prison, arguing that he should not have been tried by a military tribunal.⁵ He was paroled in 1960.

The Roosevelt administration learned several lessons from the 1942 experience. Military tribunals should not be spectacular show trials in the nation's capital, the prosecution should not be conducted by the attorney general and the judge advocate general, the president should not be the appointing official, and he should not receive the trial record directly from the tribunal. Instead, review of the trial record should be performed by trained and experienced legal experts within the office of the judge advocate general.

World War II Military Trials

Throughout World War II, federal courts largely deferred to executive and military authorities. Traditional constitutional rights, including the writ of habeas corpus, were set aside in some communities. Only after the war did the judiciary begin to recapture lost territory and defend citizen rights against military rule. Courts began to place restrictions on martial law, military tribunals, and courts-martial.

Martial Law in Hawaii

After the December 7, 1941, attack on Pearl Harbor, Hawaiian Governor J.B. Poindexter issued a proclamation at 3:30 that afternoon, turning over all governmental functions (including judicial) to Lt. Gen. Walter C. Short, Commanding General of the Hawaiian Department. On that same day, Short assumed the role of "Military

5. *Colepaugh v. Looney*, 235 F.2d 429 (10th Cir. 1956), cert. denied, 352 U.S. 1014 (1957).

Governor.” He ordered the courts to close and replaced them with two forms of military tribunal: provost courts, authorized to impose fines up to \$5,000 and imprisonment of up to five years, and a military commission, which could impose more severe sentences, including the death penalty.

On December 14, 1942, the Ninth Circuit upheld the authority of the governor of Hawaii to suspend until further notice the privilege of the writ of habeas corpus, pursuant to a statute authorizing the institution of martial law in Hawaii.⁶ Although no charges had been filed against the petitioner, Hans Zimmerman, the military kept him in prison. The Ninth Circuit said that civil courts “are ill adapted to cope with an emergency of this kind. As a rule they proceed only upon formal charges.” In a dissent, Judge Haney said that the government admitted during oral argument that there were no charges against Zimmerman for violating the U.S. Constitution, a federal statute, a statute of the Territory of Hawaii, the Articles of War, the Law of War, any order of the president, the secretary of war, the military governor, or any other commanding officer. Later, the Supreme Court denied cert on the ground that the case was moot, “it appearing that Hans Zimmerman . . . has been released from the respondent’s custody.”⁷

Although the federal courts acquiesced in this case, District Judge Delbert E. Metzger confronted the military’s detention of two other men in Hawaii, Walter Glockner and Erwin R. Seifer. In July 1943, Metzger issued a writ of habeas corpus to have the two men produced in court. When the military refused, he fined Lt. Gen. Robert C. Richardson, Jr., Commander of the Hawaiian Department, \$5,000 for contempt. Richardson upped the ante by ordering Metzger to purge the court’s records of the contempt proceedings, and threatened to punish Metzger either through the provost courts or the military commission. The Justice Department rushed in to have that order rescinded, and asked Metzger to expunge the contempt judgment and remit the fine. He declined to do that, but did reduce the fine to \$100, which President Roosevelt later canceled through a pardon (McColloch 1949).

Other cases of military arrest in Hawaii came forward. Fred Spurlock, a black American, was brought before a provost court and charged with assaulting a civilian policeman. He was placed on probation, but after getting into trouble again the provost court sentenced him to five years at hard labor. A federal district court held that the provost court lacked jurisdiction either over Spurlock or the charge brought against him, and that its judgment of conviction was thus null and void.⁸ The Ninth Circuit reversed the district court.⁹ After other Hawaiian martial law cases had been accepted by the Supreme Court, General Richardson intervened to grant Spurlock a pardon.

Japanese-Americans

The greatest wartime deprivation of individual rights in the United States fell on Japanese-Americans. In 1943, the Court unanimously upheld a curfew order directed

6. *Ex parte Zimmerman*, 132 F.2d 442 (9th Cir. 1942).

7. *Zimmerman v. Walker*, 319 U.S. 744 (1943).

8. *Ex parte Spurlock*, 66 F.Supp. 997, 1003 (D. Haw. 1944).

9. *Steer v. Spurlock*, 146 F.2d 652 (9th Cir. 1944).

against more than 100,000 Japanese-Americans, about two-thirds of them natural-born U.S. citizens.¹⁰ A concurrence by Justice Douglas said “we cannot sit in judgment on the military requirements of that hour.”¹¹ A concurrence by Justice Murphy was more critical of the ruling. He refused to accept that essential liberties could be suspended by a state of war, and regarded the singling out of the Japanese-American population by making distinctions based on color and ancestry completely inconsistent with American traditions, ideals, and principles. A third concurrence by Justice Rutledge warned that heavier sanctions against the Japanese-Americans could be challenged and struck down by the courts.

A year later, the Court split 6-3 in upholding the placement of Japanese-Americans in detention camps.¹² In the first of the dissents, Justice Roberts said that the Court’s previous support for the curfew could not be compared to placing citizens “in a concentration camp” based solely on ancestry and without any evidence of disloyalty. True to his warning, Justice Murphy said that the exclusion of Japanese-Americans “goes over ‘the brink of constitutional power’ and falls into the ugly abyss of racism.”¹³ After this decision, Murphy became convinced that it was time to impose judicial checks on the growth of military power.¹⁴

In the third dissent, Justice Jackson reminded the Court that “if any fundamental assumption underlies our system, it is that guilt is personal and not inheritable.”¹⁵ Article III of the Constitution, he said, specifically forbade punishment because of treasonable acts by parents or ancestors: “no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.” And yet here was an attempt by the government “to make an otherwise innocent act a crime merely because this prisoner is the son of parents as to whom he had no choice, and belongs to a race from which there is no way to resign.”¹⁶ He warned of the dangers when the Court lends its endorsement to military orders:

A military order, however unconstitutional, is not apt to last longer than the military emergency. Even during that period a succeeding commander may revoke it all. But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.¹⁷

10. *Hirabayashi v. United States*, 320 U.S. 81 (1943).

11. *Id.* at 106.

12. *Korematsu v. United States*, 323 U.S. 214 (1944).

13. *Id.* at 233.

14. J. Woodford Howard, Jr. *Mr. Justice Murphy: A Political Biography* (Princeton: Princeton University Press, 1968), 367.

15. 323 U.S. at 243.

16. *Id.*

17. 323 U.S. at 246.

Earl Warren was attorney general of California during the war years and supported these actions against the Japanese-Americans. Once on the Court, as chief justice, he regretted the nation's actions and particularly the record of the judiciary. In a law review article in 1962, he made a remarkable statement that decisions in the Japanese-American cases "that a given program is constitutional, does not necessarily answer the question whether, in a broader sense, it actually is" (Warren 1962, 193). No one has ever more effectively shot holes in the claim that the Court has a monopoly (or wisdom) in interpreting the Constitution. The Court's failure to invalidate the government's actions against the Japanese-Americans did not mean that constitutional standards had been followed. Far from it. In a democratic society, Warren said, "it is still the Legislature and the elected Executive who have the primary responsibility for fashioning and executing policy consistent with the Constitution" (*ibid.*, 202).

The Yamashita Case

After dividing on the Japanese-American cases, the Court split again on the military trial of General Tomoyuki Yamashita. As Commanding General of the Japanese Fourteenth Army Group in the Philippine Islands, he was charged by a military commission with failing to control the operations of his troops, allowing them to commit specified atrocities against the civilian population and prisoners of war. The commission consisted of five American generals, none of them lawyers (Feldhaus 1946, 185). Moreover, none of the generals had any serious combat command experience (Ives 2001, B2). Yamashita filed a petition for a writ of habeas corpus to the Court, contending that the commission was without lawful authority or jurisdiction to place him on trial. The Court pointed to "congressional recognition of military commissions and its sanction of their use in trying offenses against the law of war."¹⁸

A dissent by Justice Murphy agreed that the commission had been authorized by the power of Congress to "define and punish . . . Offences against the Law of Nations," but charged that Yamashita's rights under the Due Process Clause of the Fifth Amendment were violated without any justification. He had been "rushed to trial under an improper charge, given insufficient time to prepare an adequate defense, deprived of the benefits of some of the most elementary rules of evidence and summarily sentenced to be hanged." Although atrocities had been inflicted upon the Filipino population by Japanese armed forces under Yamashita's command, there was no evidence that he knew of the atrocities or in any way ordered them. In fact, U.S. forces had done everything possible to disrupt his control over Japanese troops.

In a separate dissent, Justice Rutledge concluded that the proceedings and rules of evidence of the Yamashita commission violated two Articles of War enacted by Congress. It was not in the American tradition, Rutledge said, to be charged with a crime that is defined at a later date, and in language that does not inform someone of the nature of the offense or to enable him to prepare an effective defense. Rutledge devoted one section of his dissent to explain how Articles of War 25 and 38 deprived the mili-

18. In *re Yamashita*, 327 U.S. 1, 10 (1946).

tary commission of jurisdiction to try or punish General Yamashita, while a separate section concluded that Yamashita's trial was in conflict with the Geneva Convention of 1929.

For those present at the trial, it was evident that "many of the troops that had committed the atrocities alleged in the bill of particulars were not at the time under Yamashita's command, but under the command of the 4th Air Army Headquarters or Maritime Transport Command" (Feldhaus 1946, 188). Yamashita, known as "The Tiger of Malaya" for defeating the British at Singapore, was not in the Philippines until October 7, 1944, and had nothing to do with the death march from Manila to Carabannatuan (*ibid.*, 183). The source of these statements, J. Gordon Feldhaus, was part of Yamashita's defense team. Another member of the defense team, A. Frank Reel, also wrote critically about the conduct of the trial. Regarding the treatment of Yamashita as "unjust, hypocritical, and vindictive," he advised that the United States "must learn that victory without justice is a dead thing, that humanity cannot live without charity," and that "[a]s we judge, so will we be judged; our own rights and privileges are those we grant to the lowliest and most despised of culprits" (Reel 1949, 247). Reel concludes that Yamashita "was not hanged because he was in command of troops who committed atrocities. He was hanged because he was in command of troops who committed atrocities *on the losing side*" (*ibid.*, 245).

A Revival of *Milligan*?

By 1945, the Supreme Court was prepared to place limits on martial law in Hawaii. One case involved Lloyd Duncan, a civilian shipfitter employed in the Navy Yard at Honolulu. He was tried and sentenced to imprisonment by a provost court for assaulting two Marine sentries on duty at the Navy Yard. By the time the case reached Judge Metzger, Governor Ingram M. Stainback (who succeeded Governor Poindexter) had issued a proclamation on February 8, 1943, restoring within thirty days some powers and functions to civilian agencies, including civil and criminal courts.¹⁹ Moreover, after the decisive U.S. defeat of the Japanese Navy at Midway in June 1942, both General Richardson and Admiral Chester Nimitz agreed that a Japanese invasion of Hawaii was now practically impossible. Judge Metzger held that the Organic Act of Hawaii gave Governor Poindexter no power to transfer or abdicate his authority to military officials, and that martial law did not lawfully exist in Hawaii in 1943, particularly after March 10, 1943 (the effective date of Governor Stainback's proclamation). Therefore, the office of military governor possessed no lawful authority over civilian affairs or persons, and the provost court lacked authority to try, find guilty, or sentence civilians. A similar decision was handed down by another district court.²⁰

The Ninth Circuit reversed both decisions,²¹ but on February 12, 1945, the Supreme Court granted cert to hear the two cases. The Court held that the armed forces

19. *Ex parte Duncan*, 66 F.Supp. 976, 979 (D. Haw. 1944).

20. *Ex parte White*, 66 F.Supp. 982 (D. Haw. 1944).

21. *Ex parte Duncan*, 146 F.2d 576 (9th Cir. 1944).

in Hawaii lacked the authority, during a period of martial law, to supplant all civilian laws and to substitute military tribunals for judicial trials of civilians not charged with violations of the law of war. The case was decided not on the scope of presidential power but on what Congress intended when it enacted the Organic Act of Hawaii.²² The Court held that although Congress anticipated that the Governor of Hawaii, with the approval of the president, could invoke military aid under certain circumstances, it did not explicitly declare that the governor acting with the military could use military tribunals to close all the civil courts “for days, months or years.”²³

Prisoners Outside the Country

In 1948, the Court declined to review a military tribunal created in Japan by General Douglas MacArthur. Relying on a legal fiction that the tribunal acted as the agent of the allied powers rather than of the United States, it held that U.S. courts had no power or authority to review, affirm, set aside, or annul the judgments and sentences imposed by the tribunal on the residents and citizens of Japan.²⁴ A concurrence by Justice Douglas expressed uneasiness with the decision: “if no United States court can inquire into the lawfulness of his detention, the military have acquired, contrary to our traditions (see *Ex parte Quirin*, 317 U.S. 1; *In re Yamashita*, 327 U.S. 1), a new and alarming hold on us.”²⁵

Two years later, the Court received another case testing the scope of military commissions. The issue was whether non-resident enemy aliens, tried and convicted in China by an American military commission for violations of the laws of war committed in China, had a right to a writ of habeas corpus to U.S. civilian courts. Similar to the situation of martial law in Hawaii, a lower federal court was willing to place limits on the military, but the Supreme Court was not. The DC Circuit held that any person deprived of liberty by U.S. officials is entitled to show that his confinement violates the Constitution, regardless of whether he is a citizen or an alien. The appellate court noted that the Fifth Amendment applies broadly to “any person.”²⁶ The court denied that its decision created a practical problem of transporting the twenty-one appellants to the United States for a hearing, pointing out that the Supreme Court had decided *Quirin* without the personal presence of the German saboteurs.

The Supreme Court reversed. Unlike the eight Germans in *Quirin*, these prisoners had never been or lived in the United States, were captured outside U.S. territory, were tried and convicted by a military commission sitting outside the United States for offenses against laws of war committed outside the United States, and were at all times imprisoned outside the United States.²⁷ In denying the writ of habeas corpus and refusing review for these petitioners, the Court looked less to the power of Congress and the

22. *Duncan v. Kabanamoku*, 327 U.S. 304 (1946).

23. *Id.* at 315.

24. *Hirota v. MacArthur*, 338 U.S. 197 (1948).

25. *Id.* at 201-202.

26. *Eisentrager v. Forrestal*, 174 F.2d 961, 963 (D.C. Cir. 1949).

27. *Johnson v. Eisentrager*, 339 U.S. 763, 777 (1950).

president than it did to the meaning of “any person” in the Fifth Amendment. It noted that if the Fifth Amendment “invests enemy aliens in unlawful hostile action against us with immunity from military trial, it puts them in a more protected position than our own soldiers. . . . It would be a paradox indeed if what the Amendment denied to Americans it guaranteed to enemies.”²⁸

In deciding these cases, the Court seemed to exclude judicial review of military tribunals if they were located outside the country. A dissent by Justices Black, Douglas, and Burton accused the Court of fashioning an indefensible doctrine by allowing the executive branch to decide where to try prisoners, thus stripping federal courts of power to protect against illegal incarceration. The government’s brief had argued that habeas corpus was not even available to U.S. citizens convicted and imprisoned in Germany by American military tribunals.²⁹

That precise issue reached the Court in 1952. Yvette Madsen, a native-born U.S. citizen, was charged with murdering her husband, an officer of the U.S. Air Force. She was convicted in Germany by a military commission consisting of three U.S. citizens, with review by a military appellate court of five U.S. citizens. In upholding the actions of these military commissions, the Court examined the relative powers of the president and Congress. It concluded that the president, in the “absence of attempts by Congress to limit the President’s power,” may in time of war “establish and prescribe the jurisdiction and procedure of military commissions.”³⁰ It further noted: “The policy of Congress to refrain from legislating in this uncharted area does not imply its lack of power to legislate.”³¹ Black penned the sole dissent, insisting that if American citizens in Germany were to be tried by the United States, “they should be tried under laws passed by Congress and in courts created by Congress under its constitutional authority.”³²

The broad scope given to military trials did not begin to narrow until 1955. In that year, the Court reviewed the court-martial of an ex-serviceman after he had served in Korea, been honorably discharged, and returned to the United States. Initially the Justices lined up behind the military, but Black led the dissenters to insist that the case be reargued, particularly after the confirmation of John Harlan as associate justice. After scheduling the rehearing, Chief Justice Earl Warren announced at conference that he had changed his position, thus shifting the majority to Black (Schwartz 1983, 180-81).

Writing for the Court, Black invoked Article III and the Bill of Rights to place restrictions on what Congress could do under its Article I powers and what presidents may do as commander in chief in asserting military authority over citizens. The Court ruled that ex-servicemen must be tried in federal civil courts.³³ Although the case focused on a court-martial, its reasoning could apply to military tribunals: “We find nothing in the history or constitutional treatment of military tribunals which entitles them to rank along with Article III courts as adjudicators of the guilt or innocence

28. *Id.* at 783.

29. *Id.*

30. *Madsen v. Kinsella*, 343 U.S. 341, 348 (1952).

31. *Id.* at 348-49.

32. *Id.* at 372.

33. *Toth v. Quarles*, 350 U.S. 11 (1955).

of people charged with offenses for which they can be deprived of their life, liberty or property.”³⁴

The Cases of the Murdering Wives

A series of cases from 1956 to 1960 tested the constitutionality of using courts-martial to try civilian dependents of military personnel living overseas. In one case, the wife of an Army colonel was tried by a general court-martial in Tokyo for murdering her husband. After she was found guilty and sentenced to life imprisonment, the Court found no constitutional deficiency to the proceeding.³⁵ This decision came down on June 11, 1956, just as the Court was wrapping up its business for the term. In a “Reservation,” Frankfurter delicately refers to some hasty actions: “Doubtless because of the pressure under which the Court works during its closing weeks,” several arguments “have been merely adumbrated in its opinion.”³⁶ That was fancy language for giving inadequate time and attention to a case. A dissent by Warren, Black, and Douglas is more blunt: “The questions raised are complex, the remedy drastic, and the consequences far-reaching upon the lives of civilians. The military is given new powers not hitherto thought consistent with our scheme of government. For these reasons, we need more time than is available in these closing days of the Term in which to write our dissenting views. We will file our dissents during the next Term of Court.”³⁷

On that same day, the Court held that Clarice Covert could be convicted and sentenced to life imprisonment by a court-martial in England for the murder of her husband, an Air Force sergeant. She was brought to the United States and confined in the Federal Reformatory for Women in Alderson, West Virginia. The Court distinguished this case from *Toth v. Quarles*, involving the serviceman who had been honorably discharged.³⁸ The dissent by Warren, Black, and Douglas applied to the Covert case as well.

The unseemly haste in cranking out decisions at the last minute prompted the dissenters to pressure the Court to rehear the “Cases of the Murdering Wives” (Schwartz 1983, 239-43). After granting a petition for rehearing, the Court reversed both decisions and ruled that when the United States acts against its citizens abroad, it must act in accordance with all the limitations imposed by the Constitution, including Article III and the Fifth and Sixth Amendments. Such citizens must be tried in Article III courts.³⁹ The reasoning is broad enough to cover not only courts-martial but also military tribunals. Dependents of military personnel overseas “could not constitutionally be tried by military authorities.”⁴⁰

While acknowledging that “it has not yet been definitively established to what extent the President, as Commander-in-Chief of the armed forces” can promulgate the

34. *Id.* at 17.

35. *Kinsella v. Krueger*, 351 U.S. 470 (1956).

36. *Id.* at 483.

37. *Id.* at 485-86.

38. *Reid v. Covert*, 351 U.S. 487, 491 (1956).

39. *Reid v. Covert*, 354 U.S. 1 (1957).

40. *Id.* at 5.

procedures of military courts in time of peace or war, and conceding that Congress “has given the President broad discretion to provide the rules governing military trials,” the Court issued this cautionary note:

If the President can provide rules of substantive law as well as procedure, then he and his military subordinates exercise legislative, executive and judicial powers with respect to those subject to military trials. Such blending of functions in one branch of the Government is the objectionable thing which the draftsmen of the Constitution endeavored to prevent by providing for the separation of governmental powers.⁴¹

Other decisions during this period placed restrictions on the use of courts-martial abroad to try (1) civilian dependents of military personnel and (2) civilian employees of the armed forces.⁴²

Bush’s Military Order

In many respects, the Bush order of November 13, 2001, closely tracks Roosevelt’s proclamation and military order of 1942, which established the military tribunal to try the eight German saboteurs. However, the Bush order ignored the fight within the Roosevelt administration, particularly between Secretary Stimson and Attorney General Biddle, which led to a very different proceeding when two more German spies arrived in November 1944.

For President Bush’s military tribunal, conviction and sentencing would require only two thirds of the members of the commission, the same fraction used in Roosevelt’s order. Bush’s tribunal could admit evidence that would have “probative value to a reasonable person.” Roosevelt’s order spoke of “probative value to a reasonable man.” Bush directed the secretary of defense to develop orders and regulations for the conduct of the proceedings and other matters.

Roosevelt cautioned his military tribunal to conduct a “full and fair trial.” Bush used the identical phrase. Also, Bush adopted Roosevelt’s prohibition against judicial review. A defendant “shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual’s behalf in (1) any court of the United States, or any State thereof, (2) any court of any foreign nation, or (3) any international tribunal” (66 Fed. Reg. 57835-36, § 7). Roosevelt’s order denied access to civil courts, except under such regulations as the attorney general, with the approval of the secretary of war, may prescribe. That exception does not appear in the Bush order.

The Bush order directs that the trial record, including any conviction or sentence, be submitted for review and final decision “by me or by the Secretary of Defense if so designated by me for that purpose.” The Roosevelt order of 1942 directed that the trial

41. *Id.* at 38-39.

42. *Kinsella v. Singleton*, 361 U.S. 234 (1960); *McElroy v. Guagliardo*, 361 U.S. 281 (1960); *Grisham v. Hagan*, 361 U.S. 278 (1960).

record, including any judgment or sentence, be transmitted directly to him for action. The Bush order does not follow the Roosevelt order of 1945, which processed the review first through the office of the judge advocate general, although nothing prevented the administration from adopting that procedure.

There are some marked differences between the Bush order and the Roosevelt precedents. The latter applied to eight saboteurs in 1942 and two in 1945. Bush's order covers a much larger population: any individual "not a United States citizen" who the president determines that there is "reason to believe" (1) "is or was a member of the organization known as al Qaeda," (2) "has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy," or (3) has "knowingly harbored one or more individuals described in subparagraph (1) and (2)."

By restricting the order to non-U.S. citizens, Bush seemed to respect the principle in *Ex parte Milligan* (1866) that U.S. citizens are entitled to be tried in civil courts when they are open and functioning. Yet his group of non-citizens and resident aliens represents a population of an estimated eighteen million people. FDR looked backward at a handful of known saboteurs who had confessed. Bush looked forward to a large population of unknowns, not yet apprehended or charged, from which a subset might be selected for trial by military tribunal. The portion of non-U.S. citizens at risk depends on presidential "determinations" and the definition of such terms as "international terrorism," "have as their aim," and "knowingly harbor." "Aiding or abetting" could involve innocently contributing money to a group that seemed to be a legitimate charitable or humanitarian organization, but one that the U.S. government later claims is a front that provides assistance to al Qaeda or other terrorist bodies.

ABA Task Force

A Task Force on Terrorism and the Law, organized by the American Bar Association, issued a January 4, 2002 report on military commissions. It concluded that the Bush military order raised many important issues of constitutional and international law and policy, creating a "potential reach quite broad" for which there is "no clear, controlling precedent" (American Bar Association 2002, 1). Of particular concern to the task force was the order's broad sweep covering all non-citizens. Aliens in the United States consist of two groups: those present lawfully and those present unlawfully. The first group includes "lawful permanent residents; nonimmigrants (such as diplomats, and temporary visitors for work, study, or pleasure); and certain persons in humanitarian categories." The second category includes "undocumented aliens, that is, persons who entered the United States without authorization or inspection and who have not acquired lawful status; and, status violators, that is, persons who entered the United States with authorization but who overstayed a visa or otherwise violated the terms of admission" (*ibid.*, 9, n. 21).

The task force pointed out that aliens not within the United States have "few, if any, constitutional protections," while aliens present within the United States "are enti-

tled to due process protections” (ibid., 9-10). For that reason, subjecting non-U.S. citizens outside the United States to the jurisdiction of military tribunals “raises the least likelihood of constitutional impediments, and also appears less objectionable on policy grounds. With respect to aliens already in the United States, such jurisdiction raises much more serious questions” (ibid., 10).

As to the section of the Bush order that appears to deny defendants access to civil courts, the task force notes that the broad language “does not expressly suspend the writ of habeas corpus, and it is most unlikely that it could” (ibid., 11). The task force points to such cases as *Quirin* and *Yamashita* where defendants brought their applications for writ of habeas corpus to the Supreme Court. If the Bush order led to a trial before a military commission, “it can be assumed that the validity of the order and the jurisdiction of such commissions will be reviewed in federal courts—at least with respect to any persons or trials within the United States, if the defendant has legal counsel who seeks review notwithstanding the prohibitory language of the President’s order” (ibid.).

The task force recommended that military tribunals “should be limited to narrow circumstances in which compelling security interests justify their use.” Unless specifically authorized by Congress, the task force concluded that the following persons should not be tried by military tribunals: “persons lawfully present in the United States; persons in the United States suspected or accused of offenses unconnected with the September 11 attacks; and persons not suspected or accused of violations of the law of war” (ibid., 16). Further, the task force recommended that the procedures adopted for military tribunals should be guided by the appropriate principles of law and rules of procedures and evidence prescribed for courts-martial, and should conform to Article 14 of the International Covenant on Civil and Political Rights. Included within Article 14 are provisions for an independent and impartial tribunal, open to the press and public (except for specific and compelling reasons), and various rights for the defendant, including presumption of innocence, prompt notice of charges, adequate time and facilities to prepare a defense, trial without undue delay, and other procedural safeguards. Moreover, anyone tried by a military tribunal in the United States “should be permitted to seek habeas corpus relief in United States courts” (ibid., 17).

DOD Regulations

The Defense Department took the ABA study and other recommendations into account in preparing detailed military procedures. Those procedures were released on March 21, 2002, as Military Commission Order No. 1. At a news briefing on that day, DOD General Counsel William J. Haynes II cited the 1942 decision in *Quirin* for legal support. The Supreme Court, he said, “found that the president’s order in that case was constitutional and properly applied.” However, the order released by Haynes looks less like the 1942 tribunal than it does the 1945 tribunal, because it relies much more on legal expertise within the office of judge advocate general.

The March 21 order changes some of the procedures included in the Bush order of November 13, 2001. The responsibility for appointing military commissions falls to the secretary of defense “or a designee.” The commissions established under this author-

ity “shall have jurisdiction over violations of the laws of war and all other offenses triable by military commission.” A commission shall consist of at least three but no more than seven members, each of them a commissioned officer of the United States armed forces. The presiding officer of the commission, who must be a judge advocate of any U.S. armed force, is responsible for admitting or excluding evidence.

The chief prosecutor shall be a judge advocate of any U.S. armed force. The defense counsel shall also be a judge advocate of any U.S. armed force, but the accused may retain the services of a civilian attorney, at no expense to the U.S. government, provided that the attorney is a U.S. citizen and meets certain other criteria detailed in the order. The accused shall be “presumed innocent until proven guilty.” In finding a vote of guilty, a commission member must be convinced “beyond a reasonable doubt.” The accused is not required to testify during the trial, and the commission may not draw “adverse inference” from the accused’s decision not to testify. If the accused elects to testify, the accused shall be subject to cross-examination.

The accused may obtain witnesses and documents for the accused’s defense, “to the extent necessary and reasonably available” as determined by the presiding officer. The accused may be present at every stage of the trial, unless the accused engages in disruptive conduct that justifies exclusion by the presiding officer, or unless a hearing is closed for security purposes. The defense counsel may not be excluded from any portion of the trial proceeding. The accused is entitled to a trial open to the public, although the presiding officer has authority to close proceedings, or portions of proceedings, in accordance with the procedures set forth in the order.

Instead of the two-thirds majority to convict and sentence in the Bush military order, the two thirds is retained for conviction, but a sentence of death requires “a unanimous, affirmative vote of all of the members.” From three to seven officers would sit on tribunals, but for death penalty cases, seven officers are required. Whereas under the Bush order the trial record would go directly from the tribunal to him or to the secretary of defense, the March 21 regulations require a three-member review panel appointed by the secretary of defense. At least one member shall have experience as a judge, and civilians may also be commissioned to serve on the review panel. Within thirty days the review panel shall either (1) forward the case to the secretary of defense with a recommendation as to its disposition, or (2) return the case to the appointing authority for further proceedings, provided that a majority of the review panel “has formed a definite and firm conviction that a material error of law occurred.”

The secretary of defense shall review the trial record and the recommendation of the review panel, either returning the case for further proceedings or forwarding it to the president with a recommendation as to its disposition. The case then goes to the president for review and final decision unless the president designates the secretary to perform that function. At the news briefing on March 21, DOD General Counsel Haynes acknowledged that “somebody could be tried and acquitted of that charge, but may not necessarily automatically be released.” When questioned about the exclusion of the Supreme Court from the review process, Under Secretary of Defense Douglas Feith responded: “I don’t think you’ll find anything that excludes the Supreme—it’s not within our power to exclude the Supreme Court from the process . . . as far as whether

the Supreme Court gets involved in the process, that's beyond our authority to say." Haynes added: "Far be it from me to tell the Supreme Court not to do something."

Conclusions

The Court received great credit for meeting in special session to consider the legal rights of the Nazi saboteurs. The haste with which the Court moved, however, left doubts in the minds of some whether justice had been served. Were nine hours of oral argument an impressive display of judicial independence and the rule of law or largely show? A repeat German sabotage effort late in 1944, with the submarine this time discharging its passengers off the coast of Maine, led to heated debate within the administration on the proper organization and procedures for military tribunals. As a result, significant changes were instituted.

Recent studies of *Quirin* have been quite critical of the Court. To Michal Belknap, Stone went to "such lengths to justify Roosevelt's proclamation" that he preserved the "form" of judicial review while "gutt[ing] it of substance" (Belknap 1980, 83). So long as justices marched to the beat of war drums, the Court "remained an unreliable guardian of the Bill of Rights" (ibid., 95). In a separate article, Belknap describes Frankfurter in his "Soliloquy" essay as a "judge openly hostile to the accused and manifestly unwilling to afford them procedural safeguards" (Belknap 1982, 66). David J. Danelski regards the full opinion in *Quirin* as "a rush to judgment, an agonizing effort to justify a *fait accompli*" (Danelski 1996, 61). The opinion represented a victory for the executive branch, but for the Court "an institutional defeat" (ibid., 80). The lesson for the Court is to "be wary of departing from its established rules and practices, even in times of national crisis, for at such times the Court is especially susceptible to co-optation by the executive" (ibid.).

Judicial rulings during World War II, particularly the Court's approval of the curfew and detention of Japanese-Americans, provided stark evidence of a Court in the midst of war forfeiting its reputation as the guardian of constitutional rights. With the war over, the Court began to reassert itself and place restrictions on military tribunals and courts-martial, gradually restoring the right of U.S. citizens to a jury trial in civil court. Matters changed abruptly with the September 11, 2001 terrorist attacks on the World Trade Center and the Pentagon, followed by the authorization two months later by President George W. Bush for trials by military tribunal. Issues seemingly long settled were once again actively debated. How many of the lessons learned during the World War II period can guide the current administration, Congress, and the judiciary to avoid repeating past mistakes?

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