

CRS Report for Congress

Received through the CRS Web

Military Tribunals: Historical Patterns and Lessons

July 9, 2004

Louis Fisher
Senior Specialist in Separation of Powers
Government and Finance Division

Military Tribunals: Historical Patterns and Lessons

Summary

After the terrorist operations of September 11, 2001, President George W. Bush authorized the creation of military tribunals to try individuals who offered assistance to the attacks on New York City and Washington, D.C. The military order issued by President Bush closely tracks the model established by President Franklin D. Roosevelt for a military tribunal appointed in 1942 to try eight German saboteurs. In *Ex parte Quirin* (1942), the Supreme Court unanimously upheld the jurisdiction of Roosevelt's tribunal (also called "military commission").

This report summarizes the types of military tribunals that have functioned from the Revolutionary War to the present time, explaining the legislative enactments that have guided these tribunals and the judicial decisions that have reviewed their constitutionality. One of the principal methods of legislative control over military trials, including tribunals, are the Articles of War that Congress enacts into law. The Constitution vests in Congress the power to "constitute Tribunals inferior to the supreme Court," to "make rules for the Government and Regulation of the land and naval Forces," and to "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations." By enacting Articles of War, Congress defined not only the procedures but also the punishments to be applied to the field of military law.

At various times, executive officials have claimed that the President has authority under the Constitution to create military tribunals and does not depend on statutory authorization. The Supreme Court has never accepted that argument. Instead, it looks for implied or express statutory authority when upholding military tribunals. On a number of occasions, federal courts have expressed concern that military tribunals enable an administration to exercise all three powers of government — legislative, executive, and judicial — and that the concentration of those powers threatens individual rights and liberties.

For other CRS reports on military tribunals, see CRS Report RL31191, *Terrorism and the Law of War: Trying Terrorists as War Criminals before Military Commissions*, by Jennifer Elsea; CRS Report RL31600, *The Department of Defense Rules for Military Commissions: Analysis of Procedural Rules and Comparison with Proposed Legislation and the Uniform Code of Military Justice*, by Jennifer Elsea; and CRS Report RL31340, *Military Tribunals: The Quirin Precedent*, by Louis Fisher.

This report will be updated as events warrant.

Contents

Articles of War	1
Founding Principles	3
Andrew Jackson	6
Martial Law in New Orleans	6
The Seminole War	8
The Mexican War	11
Scope of Executive Authority	14
The Civil War	16
Suspending Habeas Corpus	17
Martial Law in Missouri	18
Laws Recognizing Tribunals	19
The Dakota Trials	20
Judicial Review	22
John Merryman	22
Clement Vallandigham	23
The Milligan Case	24
Other Judicial Rulings	25
Captain Henry Wirz	26
Conspirators of Lincoln's Assassination	28
Clemency for Surratt	30
Samuel A. Mudd	31
From the Civil War to World War II	32
The Nazi Saboteur Case	37
Why a Tribunal?	37
Interlude in Civil Court	39
The Per Curiam	41
The Full Opinion	42
Evaluating the Decision	43
Another Submarine in 1944	46
Other World War II Tribunals	47
Martial Law in Hawaii	47
Trials of Three Japanese Leaders	53
Command Responsibility	58
The Eisentrager Decision	59

Placing Limits on Military Courts	60
Conclusions	65

Military Tribunals: Historical Patterns and Lessons

After the terrorist acts of September 11, 2001, President George W. Bush authorized the creation of military tribunals to try individuals who gave assistance to the attacks on New York City and Washington, D.C. The military order issued by President Bush closely traced 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 the jurisdiction of Roosevelt's tribunal.

This report summarizes the types of military tribunals that have functioned from the Revolutionary War to the present time, explaining the legislative enactments that have guided these tribunals and the judicial decisions that have reviewed their constitutionality. One of the principal methods of legislative control over military trials, including tribunals, are the Articles of War that Congress enacts into law. The Constitution vests in Congress the power to “constitute Tribunals inferior to the supreme Court,” to “make rules for the Government and Regulation of the land and naval Forces,” and to “define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.” By enacting Articles of War, Congress defined not only the procedures but also the punishments to be applied to the field of military law.

Articles of War

During the War of Independence, the Continental Congress in 1775 enacted Articles of War to specify procedures and punishments for the field of military law.¹ It established standards to deal with mutiny, sedition, insubordination, desertion, and assistance to enemies, all to be judged and punished by court-martial. The Continental Congress promulgated these standards in advance by legislation, rather than leave them to the discretion and judgment of military commanders or executive officials.

When America issued its Declaration of Independence on July 4, 1776, it identified “a long train of abuses and usurpations” and charged King George III with “affect[ing] to render the Military independent of and superior to the Civil Power.” Through this indictment the colonies set forth the principle that military commanders were at all times subordinate to legislative bodies, including specifications set forth in the Articles of War and any arrangement for military tribunals.

¹ 2 Journals of the Continental Congress 111-23 (1905).

During the War of Independence, both England and the United States depended on military courts to deal with spies. The Continental Congress adopted a resolution on August 21, 1776, stating that all persons not owing allegiance to America, “found lurking as spies in or about the fortifications or encampments of the armies of the United States,” shall suffer death or punishment by sentence of a court-martial.² A month later, the British apprehended Capt. Nathan Hale of the Continental Army, who was behind British lines on Long Island. Hale had been dressed in civilian clothes and carried documents concerning British fortifications. Found guilty by a military court, he was hanged.³

The Articles of War were at first borrowed largely from British precedents, but Congress continued to reenact and modify them. The Continental Congress adopted amendments to the Articles, including the requirement that no sentence of a general court-martial could be executed until a report was first made to Congress, the Commander in Chief, or the continental general commanding in the state.⁴ As to making changes in the military code, General George Washington advised Congress on December 8, 1779, that any alteration “can only be defined and fixed by Congress.”⁵ To that end he submitted recommendations to Congress to encourage legislative change.

In 1780, American soldiers apprehended a British spy, Major John André, who had met with the American general Benedict Arnold after maintaining a secret correspondence with him. At the time, Arnold was commandant at West Point and was willing to betray his country and surrender the fort for £20,000. When André was captured, he had in his boots papers (in Arnold’s handwriting) concerning West Point. By substituting civilian clothes for his military uniform, André’s appearance “in a disguised habit” put him in the category of a spy.⁶ With no civil court capable of prosecuting him for this offense, he was appropriately tried by a military tribunal. Spying is typically an offense against the nation, not an individual state, and spies can be prosecuted before a military rather than a civil court.

André argued that he should be treated as a prisoner of war, not a spy, because he came to Arnold under a flag of truce and obeyed orders that Arnold had a right to give. Flags do not, however, sanction treason or spying, and André’s argument that he came in legally was contradicted by his decision to change from his officer’s uniform to civilian clothes and to adopt an assumed name.⁷

² 5 Journals of the Continental Congress 693.

³ “Brief for the Respondent,” United States ex rel. Ernest Peter Burger [Ex parte Quirin], 39 Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law 472 (Philip B. Kurland and Gerhard Casper eds. 1975) (hereafter “Landmark Briefs”).

⁴ 7 Journals of the Continental Congress 264-65.

⁵ 17 The Writings of George Washington 239 (John C. Fitzpatrick ed. 1931).

⁶ 20 The Writings of George Washington 101.

⁷ James Thomas Flexner, *The Traitor and the Spy: Benedict Arnold and John André* 384 (1991 ed.).

Washington designated a board of officers to try André. The board, consisting of 14 officers, was assisted by the Judge Advocate. After hearing the case, the board recommended that André be sentenced to death, and he was hanged on October 2, 1780.

Founding Principles

Following its independence from Britain, America adopted the fundamental principle that the operation of military tribunals flowed from legislative judgments reached by the people's representatives. After ratification of the Constitution, one of the first duties of the new Congress was to pass legislation in 1789 to establish rules for the military. Vesting rulemaking authority in Congress marked a dramatic break with English precedents. British kings were accustomed to issue, on their own authority, Articles of War and military rules.⁸

Under Section 8 of Article I of the Constitution, Congress is empowered to “make rules for the Government and Regulation of the land and naval Forces.” The delegates at the Constitutional Convention understood that the language was being picked up bodily “from the existing Articles of Confederation.”⁹ Joseph Story, who served on the Supreme Court from 1811 to 1845, explained that the power of Congress to make rules for the military is “a natural incident to the preceding powers to make war, to raise armies, and to provide and maintain a navy.”¹⁰ He noted that in Great Britain the king, “in his capacity of generalissimo of the whole kingdom, has the sole power of regulating fleets and armies.”¹¹ Story continued: “The whole power is far more safe in the hands of congress, than in the executive; since otherwise the most summary and severe punishments might be inflicted at the mere will of the executive.”¹²

Legislation in 1789 stated 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.”¹³ This language incorporated the Articles of War previously adopted by the Continental Congress and gave notice that Congress, under its constitutional authority, would legislate as necessary in the future.

Congress retained the provisions of the Continental Congress rules until changing conditions forced new legislation. On January 13, 1804, the House

⁸ William Winthrop, *Military Law and Precedents* 18-19 (1920).

⁹ 2 *The Records of the Federal Convention of 1787*, at 330 (Max Farrand ed. 1937) (hereafter “Farrand”).

¹⁰ Joseph Story, *Commentaries on the Constitution of the United States* 418 (Ronald D. Rotunda and John E. Nowak eds. 1987).

¹¹ *Id.*

¹² *Id.*

¹³ 1 Stat. 96, sec. 4 (1789).

appointed a committee “to revise the rules and articles for the government of the Army of the United States.”¹⁴ Legislative debate was quite brief, giving one Member an opportunity to successfully challenge language that sought to punish military officers or soldiers who used “traitorous or disrespectful words” against the President, the Vice President, Congress, the Chief Justice, or state legislatures.¹⁵ No further action was taken until November 30, when the House again appointed a committee to revise the rules and articles of the army.¹⁶ A new bill, reported on December 12, passed the House on December 17 after the adoption of several amendments.¹⁷

The bill was referred to a Senate committee, reported with amendments, and debated on the floor.¹⁸ Senator John Quincy Adams found the bill to be too long and with numerous defects, including language that was “scarcely intelligible, or liable to double and treble equivocation.”¹⁹ He insisted that the bill be read in stages, paragraph by paragraph. The chairman of the reporting committee took great offense to this procedure. Late in the afternoon, a motion was made to recommit the bill to a select committee, but not to the one that reported it. On January 25, 1805, the amended bill was referred to a committee of three, chaired by Adams.²⁰ He reported the bill for floor action, but further consideration awaited the next session of Congress.²¹

On December 6, 1805, Representative Joseph B. Varnum reminded the House that the rules and regulations for the army “had never been revised since the era of the present Government; and that consequently the rules and regulations established during the Revolutionary war still continued in force, though our circumstances had materially changed.”²² The House appointed a committee of seven to prepare a bill, which was reported on December 18.²³ This time the bill, after House and Senate amendments, was agreed to by Congress and submitted to the President.²⁴

The bill, enacted on April 10, 1806, consisted of 101 Articles of War. Many of the provisions define the punishments and procedures to be followed by courts-martial. The statute, reflecting the André precedent, provided that in time of war “all

¹⁴ Annals of Cong., 8th Cong. 882 (1804).

¹⁵ Id. at 1190-91.

¹⁶ Annals of Cong., 8th Cong., 2nd sess. 726 (1804).

¹⁷ Id. at 808, 835-36, 858-59.

¹⁸ Id. at 27, 33, 42.

¹⁹ 1 Memoirs of John Quincy Adams 338 (1874).

²⁰ Annals of Cong., 8th Cong., 2nd sess. 42.

²¹ Id. at 64, 66.

²² Annals of Cong., 9th Cong., 1st sess. 264 (1805).

²³ Id. at 294.

²⁴ House action at 326-27, 332-33, 337-38, 339, 729, 760, 838, 849, 878; Senate action at 48, 143, 163, 167, 181-82, 200-01, 207, 210.

persons not citizens of, or owing allegiance to the United States of America, who shall be found lurking as spies, in or about the fortifications or encampments of the armies of the United States, or any of them, shall suffer death, according to the laws and usages of nations, by sentence of a general court martial.”²⁵ The sentence of death for spies was well known by all nations and particularly by the Nazi saboteurs who made their way to American shores with parts of a German uniform. In case they were captured they could claim the right to be treated not as spies but as prisoners of war.²⁶

The War of 1812 underscored the urgent need for Congress to clarify the procedures for courts-martial. President James Madison, in his Fifth Annual Message on December 7, 1813, recommended that Congress prepare “a revision of the militia laws.”²⁷ The House referred the part of the President’s message relating to militia laws to a select committee, and the committee reported legislation on February 15, 1814.²⁸ The two Houses produced a compromise measure that when to the President for his signature.²⁹

Congress reentered the field of military law in 1830 to correct a conflict of interest problem with courts-martial. Similar problems would emerge later with military tribunals. Maj. Gen. Alexander Macomb brought charges against Col. Roger Jones, Adjutant General of the Army, for issuing special orders and publishing material in the *Army Register* without first receiving Macomb’s review and approval.³⁰ Not only did Macomb bring the charges, he appeared before the court-martial as the principal prosecution witness and later approved the proceedings that decided on a reprimand for Jones.³¹

Congress found the procedure so open to abuse that it amended the Articles of War to prevent future repetitions. Article 65, as adopted in 1806, authorized any general officer commanding an army to appoint general courts-martial. Only in cases of loss of life or the dismissal of a commissioned officer would the proceedings be transmitted to the Secretary of War, to be laid before the President for confirmation or approval. All other sentences could be confirmed and executed by the officer who ordered the court to assemble.³² The general or colonel ordering the court could

²⁵ 2 Stat. 371 (Art. 101(2)).

²⁶ Louis Fisher, *Nazi Saboteurs on Trial: A Military Tribunal & American Law* 23 (2003).

²⁷ 2 A Compilation of the Messages and Papers of the Presidents 523 (James D. Richardson ed. 1925) (hereafter “Richardson”).

²⁸ *Annals of Cong.*, 13th Cong., 1st sess. - 2nd sess. 785, 1431 (1813).

²⁹ 3 Stat. 134 (1814).

³⁰ H. Doc. No. 104, 21st Cong., 1st sess. 3-4, 10-11, 14 (1830).

³¹ *Id.* at 10-12, 45. The material in the House document also appears at 4 *American State Papers: Military Affairs* 450-78 (1860).

³² 2 Stat. 367 (1806).

become the accuser and prosecutor, able to select officers hostile to the accused or personally attached to him.³³

Congress enacted legislation to provide that whenever a general officer is “the accuser or prosecutor” of any officer under his command, “the general court-martial for the trial of such officer shall be appointed by the President of the United States.”³⁴ This statute corrected the conflict of interest within the military but not within the executive branch. For example, in the Nazi saboteur case of 1942, President Franklin D. Roosevelt issued a military order and proclamation to create a military tribunal, appointed the generals who served on the tribunal, and appointed the prosecutors (the Attorney General and the Judge Advocate General) and the colonels who served as defense counsel. All of those officials were subordinate to the President. After the tribunal completed its deliberations and reached a verdict, the court transcript then went to Roosevelt as the final reviewing authority.

During the nineteenth century, Congress had to contend with initiatives taken by several generals (Andrew Jackson and Winfield Scott) who decided it was necessary on their own authority to create military tribunals. During the Civil War there was particularly heavy use of tribunals, leading to several important judicial decisions.

Andrew Jackson

General Andrew Jackson resorted to military tribunals on two occasions: during the War of 1812 and while commanding troops in Florida in 1818. Both exercises of authority were highly controversial and led to responses by federal courts and Congress.

Martial Law in New Orleans

During the War of 1812, Jackson invoked martial law when he commanded American forces at New Orleans. On December 15, 1814, anticipating a British invasion of the city, he issued a statement alerting residents to “his unalterable determination rigidly to execute the martial law in all cases which may come within his province.”³⁵ The general order for martial law was released the next day, requiring anyone entering the city to report to the Adjutant General’s office. Anyone found in the streets after 9 p.m. “shall be apprehended as spies and held for examination.”³⁶

³³ Cong. Debates, 21st Cong., 1st sess. 575 (1830) (remarks by Rep. William Drayton).

³⁴ 4 Stat. 417 (1830).

³⁵ 3 The Papers of Andrew Jackson 205 (Harold D. Moser ed. 1991).

³⁶ Id. at 206-07. See also Robert V. Remini, *The Battle for New Orleans: Andrew Jackson and America’s First Military Victory* 57-59 (2001 paper ed.).

After Jackson's victory over the British, the citizens of New Orleans expected him to rescind the order for martial law. However, Jackson continued to wait until he received word that peace negotiations underway at Ghent were complete. An article in the local newspaper by Louis Louallier insisted that persons accused of a crime should be heard before a civil judge, not military tribunals, and called Jackson's policy "no longer compatible with our dignity and our oath of making the Constitution respected."³⁷ Jackson had him arrested on March 5, 1815, for inciting mutiny and disaffection in the army. Louallier's lawyer went to U.S. District Judge Dominick Augustin Hall to request a writ of habeas corpus, which the judge granted after concluding that martial law could no longer be justified.

Jackson directed his military officers that "should any person attempt by serving a writ of Habeas corpus" for Louallier, that person was to be arrested and confined.³⁸ Claiming that Judge Hall had engaged "in aiding abetting and exciting mutiny within my camp," Jackson ordered his arrest and confinement.³⁹ Hall found himself locked up in the same barracks as the writer.⁴⁰

A court-martial acquitted Louallier, in part because he challenged the jurisdiction of the court to try someone who was not a member of the militia or the army. As to the charge of spying, the court considered it a stretch that a spy would publish his views in a newspaper that circulated in Jackson's camp. Jackson disagreed with the acquittal and kept Louallier in jail. As for Judge Hall, Jackson decided that the military court was unlikely to convict a federal judge and simply ordered Hall out of the city, not to return until the official announcement of peace or until the British left the southern coast.⁴¹ On March 12, 1815, Jackson's troops marched Hall four miles outside of New Orleans and left him there. On the following day, after official confirmation of the peace treaty arrived, Jackson revoked martial law and released Louallier.⁴²

Judge Hall returned to the city and waited a few days for the celebrations to subside. On March 22, he ordered Jackson to appear in court to show why he should not be held in contempt for refusing to obey the court's writ of habeas corpus and for

³⁷ Robert V. Remini, *Andrew Jackson and the Course of American Empire, 1767-1821*, at 310 (1977). There are a variety of spellings: Louallier, Louiallier, and Louailler. The first appears to be more reliable because of contemporary usage. See Henry P. Dart, ed., "Andrew Jackson and Judge D. A. Hall," 5 *La. Hist. Q.* 509, 538-45 (1922).

³⁸ 2 *Correspondence of Andrew Jackson* 183 (letter to Lt. Col. Mathew Arbuckle, March 5, 1815).

³⁹ *Id.*

⁴⁰ Remini, *Andrew Jackson and the Course of American Empire*, at 310.

⁴¹ 2 *Correspondence of Andrew Jackson* 189 (letter to Capt. Peter Ogden, March 11, 1815, and order to Judge Hall, March 11, 1815).

⁴² 3 *Papers of Andrew Jackson* 310; Remini, *Andrew Jackson and the Course of American Empire* 312.

having imprisoned Hall.⁴³ Jackson appeared with an aide, submitted a written statement why he was not in contempt, and withdrew. He also returned to the court on March 31 to answer interrogatories. After further proceedings, Hall fined Jackson \$1,000, which Jackson paid.⁴⁴

Congress later passed legislation to remit the fine imposed on Jackson. A bill for that purpose was initially introduced on March 10, 1842.⁴⁵ President John Tyler urged Congress to pass the bill.⁴⁶ Some versions of the bill were drafted to avoid any possible reproach on Judge Hall, such as by stating that “nothing herein contained shall be intended to be so construed as to imply any censure upon the judge who imposed said fine, or in any way to question the propriety of his decision in said case.”⁴⁷ Qualifications of that nature, however, were removed from the bill that became law in 1844.⁴⁸ Debate on the bill was extensive because lawmakers differed sharply on whether more credit was due to Jackson for defending the city or to Hall for defending the Constitution.⁴⁹

The Seminole War

In 1818, while commanding troops in the Seminole War, General Jackson again turned to a military tribunal. This time the trial involved two British subjects, Alexander Arbuthnot and Robert Christy Ambrister, charged with inciting and aiding the Creek Indians to war against the United States. Arbuthnot was also charged with acting as a spy and inciting the Indians to murder two men. He pleaded not guilty to all charges, while Ambrister pleaded not guilty to aiding and abetting the Creeks but guilty with justification to the charge that he led and commanded the Lower Creeks in carrying on a war against the United States.⁵⁰

The “special court” consisted of eleven officers, headed by Maj. Gen. Edmund P. Gaines. Arbuthnot asked for legal representation and was granted counsel; the record does not indicate whether Ambrister requested counsel or was granted one.

⁴³ Dart, “Andrew Jackson and Judge D. A. Hall,” at 545.

⁴⁴ 3 Papers of Andrew Jackson 332, 342-43; John Spencer Bassett, *The Life of Andrew Jackson* 228-29 (1931). For other accounts of the contempt proceedings, see John Reid and John Henry Eaton, *The Life of Andrew Jackson* 384-90 (1817) and Jonathan Lurie, “Andrew Jackson, Martial Law, Civilian Control of the Military, and American Politics: An Intriguing Amalgam,” 126 *Mil. L. Rev.* 133 (1989).

⁴⁵ Cong. Globe, 27th Cong., 2nd sess. 304 (1842).

⁴⁶ 5 Richardson 2062.

⁴⁷ Cong. Globe, 28th Cong., 1st sess. 87 (1843).

⁴⁸ 5 Stat. 651 (1844).

⁴⁹ E.g., statement by Rep. Alexander H. Stephens, Cong. Globe, 28th Cong., 1st Sess. 87 (1843). For the debate, see *id.* at 18, 87-96, 111-15, 117-20, 206, 230, 245, 250-51, 263, 267-69, 274, 278. Also, see the separate floor statements in the Appendix to the Congressional Globe, 28th Cong., 1st Sess. 26-28, 32-37, 43-48, 58-63, 88-89, 112-13, 145, 194-96, 206-11, 226-30 (1844).

⁵⁰ 1 American State Papers: Military Affairs 721, 731 (1832).

In the trial of Arbuthnot, the court heard from three witnesses for the prosecution and accepted a number of documents to be entered into the record. After Arbuthnot or his attorney cross-examined two of the witnesses, the court found him guilty of all charges except “acting as a spy.” By a two-thirds majority, the court sentenced him to “be suspended by the neck until he is dead.”⁵¹

Ambrister’s trial was conducted in similar fashion, with the court finding him guilty on most charges but not guilty on one of the specifications. He was sentenced “to suffer death by being shot, two-thirds of the court concurring therein.” One of the members of the court requested reconsideration of his vote on the sentence, forcing a revote. The court then decided to sentence Ambrister to “receive fifty stripes on his bare back” and be confined with ball and chain to hard labor for twelve months.⁵² Jackson overrode the court and directed that Ambrister be shot, an order that was carried out.

In his State of the Union Message on November 16, 1818, President James Monroe made reference to the trial of Arbuthnot and Ambrister and forwarded a number of documents to Congress related to the case.⁵³ The following year, the House Committee on Military Affairs issued a report highly critical of the trials. The committee could find “no law of the United States authorizing a trial before a military court for offenses such as are alleged” against the two men, except that of “acting as a spy,” for which Arbuthnot was found not guilty.⁵⁴ It acknowledged that the law of nations recognized that “where the war is with a savage nation, which observes no rules, and never gives quarter, we may punish them in the persons of any of their people whom we may take, (these belonging to the number of the guilty,) and endeavor, by this rigorous proceeding, to force them to respect the laws of humanity; but wherever severity is not absolutely necessary, clemency becomes a duty.” Having examined the documentation, the committee was unable to find “a shadow of necessity for the death of the persons arraigned before the court.”⁵⁵

In looking through the general order of April 29, 1818, issued by Jackson for the executions, the committee discovered “this remarkable reason” to justify the deaths: “It is an established principle of the law of nations, that any individual of a nation, making war against the citizens of another nation, they being at peace, forfeits his allegiance, and becomes an outlaw and a pirate.” The committee associated piracy with actions on the high seas, over which Jackson’s military court would have no jurisdiction. The committee found similar difficulty in applying the charge of

⁵¹ Id. at 730.

⁵² Id. at 734.

⁵³ 2 Richardson 612. These documents are reprinted in *Annals of Cong.*, 15th Cong., 2nd sess., starting at page 2136.

⁵⁴ 1 American State Papers: Military Affairs 735.

⁵⁵ Id.

“outlaw” to Arbuthnot and Ambrister, for that term “applies only to the relations of individuals with their own Government.”⁵⁶

The committee called particular attention to the execution of Ambrister, “who, after having been subjected to a trial before a court which had no cognizance or jurisdiction over the offences charged against him, was shot by order of the commanding general [Jackson], contrary of the forms and usages of the army, and without regard to the finding of that court, which has been instituted as a guide for himself.” The committee also criticized the military court that tried the two men: “A court-martial is a tribunal erected with limited jurisdiction, having for its guidance the same rules of evidence which govern courts of law; and yet Ambuthnot is refused by the court-martial, before whom he was on trial for his life, the benefit of Ambrister, who had not been put upon his trial at that time, and whose evidence would have been received by any court of law, as legal, if not credible.” The committee further rebuked the court for allowing a leading question to one of the witnesses for the prosecution, William Hambly. By allowing this question and response, the court relied on an expression of opinion and belief rather than a statement of facts, “upon which alone could the court act.” Hearsay evidence “in a case of life and death,” the committee said, “was never before received against the accused in any court of this country.”⁵⁷

Having completed this evaluation, the committee disapproved the proceedings in the trial and execution of Arbuthnot and Ambrister. A minority report from the committee largely defended Jackson’s actions, discovering “much which merits applause, and little that deserves censure.” It faulted Jackson only for not accepting the judgment of the military court, which first sentenced Ambrister to be shot but later changed that to corporal punishment and confinement at hard labor. Jackson disapproved the change and ordered the execution. To the minority, it would have been “more correct for General Jackson, after submitting his case to a court-martial, not only to examine the facts as to his guilt, but to determine the punishment to be inflicted,” thus acquiescing in the court’s final decision.⁵⁸

In 1819, the House drafted a resolution to disapprove the “proceedings in the trial and execution” of Arbuthnot and Ambrister.⁵⁹ After almost a month of debate, the resolution to censure Jackson was rejected in the Committee of the Whole by a vote of 54 to 90. The full House concurred with that judgment, voting 108 to 62 to support the trial and execution of Arbuthnot, and 107 to 63 to support the trial and execution of Ambrister.⁶⁰

⁵⁶ Id.

⁵⁷ Id.

⁵⁸ Id. at 739. The committee report also appears at *Annals of Cong.*, 15th Cong., 2d Sess. 515-27 (1819). The trial material, in the form printed in the *American State Papers*, was first published as *The Trials of A. Arbuthnot & R. C. Ambrister, Charged with Exciting the Seminole Indians to War Against the United States of America* (1819).

⁵⁹ *Annals of Cong.*, 15th Cong., 2d Sess. 583 (1819).

⁶⁰ Id. at 1132, 1136.

Jackson then faced a critical Senate report issued on February 24, 1819 by a select committee created to examine the conduct of the Seminole War. In reviewing the executions of Arbuthnot and Ambrister, the committee said it “cannot but consider it as an unnecessary act of severity, on the part of the commanding general, and a departure from that mild and humane system towards prisoners, which, in all our conflicts with savage or civilized nations, has heretofore been considered, not only honorable to the national character, but conformable to the dictates of sound policy.” As prisoners of war and subjects of a country “with whom the United States are at peace,” the two men were entitled to be treated at least on a par with Indians. “No process of reasoning,” said the committee, “can degrade them below the savages with whom they were connected.” The committee further noted: “Humanity shudders at the idea of a cold-blooded execution of prisoners, disarmed, and in the power of the conquerer.” The committee rejected the theory that Arbuthnot and Ambrister were “outlaws and pirates,” and pointed out that Jackson, having created a military court to try them, set aside the sentence of whipping and confinement “and substituted for that sentence his own arbitrary will.”⁶¹ The Senate adjourned sine die on March 3 without taking action on the committee report.

Experts in military law have differed on the legitimacy of Jackson’s action. William Winthrop, writing toward the end of the nineteenth century, noted that if any officer ordered an execution in the manner of Jackson he “would *now* be indictable for murder.”⁶² To William Birkhimer, in his 1904 treatise, Jackson had asked the special court only for its *opinion*, both as to guilt and punishment, and the delivery of that opinion could not divest Jackson of the authority he possessed from the beginning: to proceed summarily against Arbuthnot and Ambrister and order their execution.⁶³ Birkhimer’s analysis would allow generals to execute civilians without trial or to dispense with the fact-finding and judgment that results from trial proceedings.

The Mexican War

Military tribunals were used by General Winfield Scott during the war against Mexico, when American forces found themselves in a foreign country without a reliable judicial system to try offenders. He was concerned particularly about the lack of discipline and misconduct among American volunteer soldiers. Before he left Washington, D.C., to assume command, he drafted an order calling for martial law in Mexico for both American soldiers and Mexican citizens. He showed the draft order to Secretary of War William Marcy and Attorney General Nathan Clifford. Neither official expressed disapproval or opposition.⁶⁴ Marcy turned to Congress to

⁶¹ S. Doc. No. 100, 15th Cong., 2nd sess. 11-12 (1819). This committee report is reprinted at *Annals of Cong.*, 15th Cong., 2nd sess. 256-68 (1819). The language quoted in this report appears on page 267.

⁶² Winthrop, *Military Law and Precedents* 465 (italics in original).

⁶³ William E. Birkhimer, *Military Government and Martial Law* 354 (1904).

⁶⁴ Timothy D. Johnson, *Winfield Scott: The Quest for Military Glory* 165 (1998).

recommend legislation that would authorize a military tribunal, but lawmakers declined to act.⁶⁵

Scott knew from military history that lawless and undisciplined action by American soldiers in Mexico would invite and incite guerrilla uprisings. He was familiar with the mistakes of French soldiers, under Napoleon's command, when they invaded Spain. Reacting to their record of plunder and rape, Spanish residents revolted and sparked a cycle of violence and atrocities. Scott intended to enforce discipline across the board to avert guerrilla war. He designed the martial law order to guarantee Mexican property rights and to recognize the sanctity of religious structures.⁶⁶

On February 19, 1847, General Scott issued General Orders No. 20, proclaiming a state of martial law at Tampico. Certain specified acts committed by civilians or military persons would be tried before military tribunals. He was particularly concerned about the behavior of "the wild volunteers" who, as soon as they crossed the Rio Grande, "committed, with impunity, all sorts of atrocities on the persons and property of Mexicans."⁶⁷ Scott could discover "no legal punishment for any of those offences, for by the strange omission of Congress, American troops take with them beyond the limits of their own country, no law but the Constitution of the United States, and the rules and articles of war." Those legal standards "do not provide any court for the trial and punishment of murder, rape, theft, &c., &c. — no matter by whom, or on whom committed."⁶⁸

Scott never questioned the ultimate authority of Congress to control military tribunals. To "suppress these disgraceful acts abroad," he issued the martial law order "until Congress could be stimulated to legislate on the subject."⁶⁹ Under his order, "all offenders, Americans and Mexicans, were alike punished — with death for murder or rape, and for other crimes proportionally."⁷⁰ His order also provided for a special American tribunal "for any case to which an American might be a party."⁷¹ Scott said that his order "worked like a charm; that it conciliated Mexicans; intimidated the vicious of the several races, and being executed with impartial rigor, gave the highest moral deportment and discipline ever known to an invading army."⁷²

Scott sought clarifying authority from Congress but was unsuccessful. Four days before proclaiming martial law, Marcy wrote to Scott that it was not reasonable to expect enactment of an additional Article of War "giving authority to military

⁶⁵ 2 Justin H. Smith, *The War With Mexico* 220 (1919).

⁶⁶ Johnson, *Winfield Scott*, at 166-68.

⁶⁷ 2 *Memoirs of Lieut.-General Scott* 392 (1864).

⁶⁸ *Id.* at 393.

⁶⁹ *Id.*

⁷⁰ *Id.* at 395.

⁷¹ *Id.*

⁷² *Id.* at 396.

tribunals to try and punish certain offences not expressly embraced in the existing articles.” Marcy had discussed the matter with the chairman of a Senate committee and was advised that the chairman, after considering the matter, saw no need for legislation. The right to punish for such offences “necessarily resulted from the condition of things when an army is prosecuting hostilities in an enemy’s country.”⁷³

The martial law order represented a blend of executive initiative and statutory authority. The first paragraph stated that in the war between the United States and Mexico there were “many grave offences, not provided for in the act of Congress ‘establishing rules and articles for the government of the armies of the United States,’” enacted in 1806.⁷⁴ A supplemental code, he said, “is absolutely needed.”⁷⁵ He called this “*unwritten* code” martial law, “an addition to the *written* military code, prescribed by Congress in the rules and articles of war.”⁷⁶ All offenders “shall be promptly seized, confined, and reported for trial, before military commissions, . . . 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.”⁷⁷ Scott’s order distinguished between the competing jurisdictions of military tribunals and courts-martial. No tribunal “shall try any case clearly cognizable by any court martial.”⁷⁸

Scott also looked to state policy to limit the reach of his order. No sentence of a tribunal “shall be put in execution against any individual belonging to this army, which may not be, according to the nature and degree of the offence, as established by the evidence, in conformity with known punishment, in like cases, in some one of the States of the United States of America.”⁷⁹ Furthermore, any punishment for the sale, waste or loss of ammunition, horses, arms, clothing “or accoutrements” by soldiers would be governed by Articles of War 37 and 38.⁸⁰

The Supreme Court reviewed and overturned some of the actions taken by military authorities during the Mexican War. As Commander in Chief, the President “is authorized to direct the movements of the naval and military forces placed *by law* at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy.”⁸¹ The Court thus looked to legislation to define the limits of presidential power in time of war. The President “may invade the hostile country, and subject it to the sovereignty and authority of the United States. But his conquests do not enlarge the boundaries of the Union, nor extend the operation of our institutions and laws beyond the limits before assigned to them by

⁷³ H. Exec. Doc. No. 56, 30th Cong., 1st sess. 63-64 (1848).

⁷⁴ 2 Memoirs of Lieut.-General Scott 540-41.

⁷⁵ *Id.* at 542.

⁷⁶ *Id.* (emphasis in original).

⁷⁷ *Id.* at 544.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Fleming v. Page*, 9 How. (50 U.S.) 603, 615 (1850) (emphasis added).

the legislative power.⁸² The Court overturned actions in Mexico by military officers who seized private property,⁸³ and it limited the right of the President or military officers to create courts outside the United States.⁸⁴

Scope of Executive Authority

Throughout the first seven decades of the American republic, executive officials recognized that the ultimate constitutional authority to create and regulate military tribunals lay with Congress, not the President. Macomb, in his 1809 treatise on martial law, warned that the President or commanding officer “can no more interfere with the procedure of Courts-Martial, in the execution of their duty, than they can with any of the fixed courts of justice.”⁸⁵ Through the power of pardon, the President may “entirely remit the punishment” decided by a court-martial, “but he can no more decree any particular alteration of their sentence, than he can alter the judgment of a civil court, or the verdict of a jury.”⁸⁶ Constitutionally, the President could lessen or cancel a sentence but not increase the penalty or rewrite the judgment.

In 1818, Attorney General William Wirt issued a legal memorandum on the authority needed to order a new trial before a military court. Article of War 87 expressly stated that “no officer, non-commissioned officer, soldier, or follower of the army, shall be tried a second time for the same offence.”⁸⁷ During the proceedings of a court-martial, the Judge Advocate refused to arraign Capt. Nathaniel N. Hall because he had already been tried by a court-martial on the same charge. The sentence of the first court had been disapproved by the President.⁸⁸ The question presented to Wirt was whether a President “has the right, under these circumstances, to order a new trial.”⁸⁹

It is a “clear principle,” reasoned Wirt, that the President “has no powers except those derived from the constitution and laws of the United State; if the power in question, therefore, cannot be fairly deduced from these sources, it does not exist at all.”⁹⁰ The Constitution made the President Commander in Chief, but

in a government limited like ours, it could not be safe to draw from this provision inferential powers, by a forced analogy to other governments differently constituted. Let us draw from it, therefore, no other inference than that, under

⁸² *Id.*

⁸³ *Mitchell v. Harmony*, 13 How. (54 U.S.) 115, 135 (1851).

⁸⁴ *Jecker v. Montgomery*. 13 How. (54 U.S.) 498, 515 (1852).

⁸⁵ Macomb, *A Treatise of Martial Law* 8-9.

⁸⁶ *Id.* at 9.

⁸⁷ 2 Stat. 369 (1806).

⁸⁸ 1 Op. Att’y Gen. 233 (1818).

⁸⁹ *Id.* at 234.

⁹⁰ *Id.*

the constitution, the President is the national and proper depository of the final appellate power, in all judicial matters touching the policy 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.⁹¹

Wirt noted that Congress had granted the President an appellate role over military trials. A statute enacted in 1802 provided that officers, non-commissioned officers and other members of the military “shall be governed by the rules and articles of war, which have been established” by Congress, “or by such rules and articles as may be hereafter, by law, established.” Nevertheless, any sentence of a general court-martial “extending to the loss of life, the dismissal of a commissioned officer, or which shall respect the general officer, shall, with the whole proceedings of such cases, respectively, be laid before the President of the United States, who is hereby authorized to direct the same to be carried into execution, or otherwise, as he shall judge proper.”⁹²

To judge the scope of this power, Wirt looked for guidance to the enactments of the Continental Congress, to British precedents, and to the values that infused the War of Independence.⁹³ America, projecting a system of rules “on more liberal and bolder principles in favor of the citizen,” and acting in the spirit of “enlarged views of human liberty,” could not have “narrowed the rights and privileges of the American citizen, and surrendered him to a military despotism more severe than that which they were throwing off.”⁹⁴ He concluded that it was inappropriate to deny the President the right to grant a new trial when it would benefit the party accused.⁹⁵ In this case, the prisoner expressly asked for a new trial. Wirt offered his opinion that the President “is vested by the laws with the power of ordering a new trial for the benefit of the prisoner.”⁹⁶ The President possessed that discretion “by the laws,” not by some inherent power. Moreover, the President could not order a new trial if the accused were acquitted. A new trial is appropriate not when “ordered *against him* — it is only *for him*.”⁹⁷

The President, as Commander in Chief, exercises authority over the military services. In an opinion in 1820, Wirt explained that the Departments of War and of the Navy “are the channels through which his orders proceed to them, respectively, and the Secretaries of those departments are the organs by which he makes his will known to them.”⁹⁸ Through this hierarchical control the President may direct obedience to his orders, unless Congress has already given contrary orders to

⁹¹ Id.

⁹² 2 Stat. 134, sec. 10 (1802). Wirt inaccurately refers to this as “the 14th section of the act.”

⁹³ 1 Op. Att’y Gen. 235-36

⁹⁴ Id. at 237.

⁹⁵ Id. at 240.

⁹⁶ Id. at 242.

⁹⁷ Id. at 241 (emphasis in original).

⁹⁸ 1 Op. Att’y Gen. 380-81 (1820).

executive officers by statute. Thus, the President may suspend, modify, or rescind any order issued by military officers, “except where a direct authority has been given by Congress to an officer to perform any particular function — for example, for a commanding officer to order courts-martial in certain cases.”⁹⁹

The Civil War

The heaviest use of military tribunals occurred during the Civil War, after President Lincoln suspended the writ of habeas corpus and authorized martial law in several regions. Congress passed legislation to regulate the suspension of the writ, and federal courts — after the war — imposed limits on tribunals when civil courts were open and operating.

In April 1861, with Congress in recess, President Lincoln issued proclamations to call out the state militia, increase the size of the Army and Navy, suspend the writ of habeas corpus in selected regions, and place a blockade on the rebellious states.¹⁰⁰ When Congress assembled in special session on July 4, he explained that the outbreak of civil war left him no choice but “to call out the war power of the Government and so to resist force employed for the destruction by force for its preservation.”¹⁰¹ His measures, “whether strictly legal or not, were ventured upon under what appeared to be a popular demand and a public necessity, trusting then, as now, that Congress would readily ratify them.” Lincoln believed that “nothing has been done beyond the constitutional competency of Congress.”¹⁰²

In presenting the issue in this manner, Lincoln acknowledged that he had exercised not only the powers available to the President but also the powers vested in Congress. Especially was that so by suspending the writ of habeas corpus. The power to suspend appears in Article I: “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.” Although the power of suspension is in Article I, Lincoln said that the Constitution “itself is silent as to which or who is to exercise this power; and as the provision was plainly made for a dangerous emergency, it can not be believed 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.”¹⁰³

Having questioned the legality of his actions, Lincoln identified the process needed to bring his proclamations and orders into harmony with the Constitution: a statute passed by Congress. Congress debated his request at length, with many Members eventually supporting Lincoln with the explicit understanding that his acts,

⁹⁹ Id. at 381.

¹⁰⁰ 7 Richardson 3214-30.

¹⁰¹ Id. at 3224.

¹⁰² Id. at 3225.

¹⁰³ Id. at 3226.

standing alone, were illegal.¹⁰⁴ Legislation on August 6 provided that “all the acts, proclamations, and orders” of President Lincoln after March 4, 1861, respecting the army and navy and calling out the state militia “are hereby approved and in all respects legalized and made valid, to the same extent and with the same effect as if they had been issued and done under the previous express authority and direction of the Congress of the United States.”¹⁰⁵

Suspending Habeas Corpus

The day after Congress assembled in special session, Attorney General Edward Bates submitted to Lincoln his analysis of the President’s authority to suspend the privilege of the writ of habeas corpus. From British times, prisoners relied on the writ to appeal to a judge that they were being unjustly held. Once a judge issued a writ, the custodian of a prisoner must bring the person before the court and defend the detention. Bates concluded that in times of “a great and dangerous insurrection,” the President has discretion 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.”¹⁰⁶ In case of such an arrest, Bates said, Presidents are justified in refusing to obey a writ of habeas corpus issued by a court.

Much of Bates’s argument rested on the President’s oath of office to “preserve, protect and defend the Constitution of the United States.”¹⁰⁷ The President could not defend the Constitution “without putting down rebellion, insurrection, and all unlawful combinations to resist the General Government.”¹⁰⁸ On the manner in which the insurrection is suppressed “the President must, of necessity, be the sole judge.”¹⁰⁹ Bates conceded that Presidents could abuse this power, in which case they would be subject “to impeachment and condemnation.”¹¹⁰ Bates qualified his opinion by saying that if the constitutional language meant “a repeal of all power to issue the writ, then I freely admit that none by Congress can do it.” The President’s power to suspend the privilege in times of dangerous rebellion was “temporary and exceptional.”¹¹¹

Both Lincoln and Bates acknowledged congressional power to pass legislation that defines when and how a President may suspend the writ of habeas corpus during

¹⁰⁴ E.g., remarks by Sen. Breckinridge at Cong. Globe, 37th Cong., 1st sess. 137-42 (1861) and Sen. Howe, *id.* at 393.

¹⁰⁵ 12 Stat. 326 (1861).

¹⁰⁶ 10 Op. Att’y Gen. 74, 81 (1861).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 82-83.

¹⁰⁹ *Id.* at 84.

¹¹⁰ *Id.* at 85.

¹¹¹ *Id.* at 90.

a rebellion. On March 3, 1863, Congress enacted a bill authorizing the President, during the rebellion, to suspend the privilege of the writ of habeas corpus “whenever, in his judgment, the public safety may require it.” And yet Congress placed an important restriction on the President. The statute directed the Secretary of State and the Secretary of War, “as soon as may be practicable,” to furnish federal courts with a list of the names of all persons, “citizens of states in which the administration of the laws has continued unimpaired in the said Federal courts,” who are held as prisoners by order of the President or executive officers.¹¹² Failure to furnish the list could result in the discharge of a prisoner.¹¹³ In *Ex parte Milligan* (1866), the Supreme Court would rely on this statute to limit executive power.

Martial Law in Missouri

On August 30, 1861, Maj. Gen. John C. Frémont issued a proclamation stating that circumstances in Missouri were sufficiently urgent to compel him to “assume the administrative powers of the State” and declare martial law. Persons within a prescribed territory with weapons in their hands would be tried by court-martial “and if found guilty will be shot.” His proclamation was directed particularly to those who attempted to destroy railroad tracks, bridges, or telegraph lines.¹¹⁴ The state of emergency, he said, was not intended to suspend all of the operations of the civil courts.¹¹⁵

Lincoln quickly countermanded Frémont’s proclamation, fearing that the decision to shoot Confederates would lead to the shooting of Union soldiers. He told Frémont on September 2 that no one was to be shot without the President’s consent.¹¹⁶ Lincoln also took sharp exception to language in the proclamation that threatened to liberate slaves held by traitorous owners. Such a policy, he warned, “will alarm our Southern Union friends, and turn them against us.”¹¹⁷ There was great risk that Maryland would join the southern cause.

Military tribunals assembled in September 1861 to consider charges ranging from the destruction of railroad ties, tracks, railroad cars, and telegraph lines, all of which fell within the broad category of “the laws of war.”¹¹⁸ On January 1, 1862, Maj. Gen. Henry W. Halleck said that civil courts “can give us no assistance as they

¹¹² 12 Stat. 755 (1863).

¹¹³ *Id.* at 756, sec. 3.

¹¹⁴ 2:1 *The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies* 221 (1894) (hereafter “*War of the Rebellion*”). 2:1 stands for Series II, Vol. I.

¹¹⁵ *Id.* at 222.

¹¹⁶ 4 *The Collected Works of Abraham Lincoln* 506 (Roy P. Basler ed. 1953) (hereafter “*Lincoln*”).

¹¹⁷ *Id.*

¹¹⁸ 2:1 *The War of the Rebellion* 282-89, 402-05, 407.

are very generally unreliable. There is no alternative but to enforce martial law.”¹¹⁹ On that same day, a general order from Army headquarters in St. Louis stated that “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.”¹²⁰ Offenses within the jurisdiction of civil courts “whenever such loyal courts exist will not be tried by a military commission.”¹²¹

Tribunals were instruments to enforce not so much the Articles of War, enacted by Congress and delegated to courts-martial, but rather the customary international standards known as the “laws of war.” It was a well-established principle, said General Halleck, that “insurgents and marauding, predatory and guerrilla bands are not entitled” to an exemption from military tribunals. These men are “by the laws of war regarded as no more nor less than murderers, robbers and thieves.” Wearing military uniforms “cannot change the character of their offenses nor exempt them from punishment.”¹²²

President Lincoln, assisted by the office of adjutant general, reviewed and often overturned the work of tribunals. After a tribunal in St. Louis ordered a civilian to be shot for giving aid and comfort to the enemy, the sentence was nullified because nothing had been proved “except the utterance of very disloyal sentiments. No *acts* are shown which would warrant the sentence of death.”¹²³ When a tribunal in Missouri found an individual guilty of murder and “a bad and dangerous man” (for being a member of a guerrilla band) and ordered him shot, Lincoln disapproved the sentence because the record was “fatally defective.”¹²⁴ In other cases, tribunals sentenced rebel soldiers, in uniform, to death for treason. Those proceedings were disapproved by Lincoln because “the record shows clearly that the accused are prisoners of war.”¹²⁵

Laws Recognizing Tribunals

The tribunals created during the Civil War originated from the executive branch, not from Congress. Nevertheless, several statutes enacted from 1862 to 1864 recognized the existence and operation of tribunals. Legislation on July 17, 1862 authorize the President to appoint, by and with the advice and consent of the Senate, a judge advocate general, “to whose office shall be returned, for revision, the records

¹¹⁹ *Id.* at 247.

¹²⁰ *Id.*

¹²¹ *Id.* at 248.

¹²² *Id.* at 242-43.

¹²³ General Orders No. 230, included in U.S. War Department, General Orders 1863, vol. 5 (Nos. 201-300), Library of Congress, at 2-3, 6 (emphasis in original).

¹²⁴ *Id.* at 3-5, 6.

¹²⁵ General Orders No. 145, included in U.S. War Department, General Orders 1863, vol. 4 (Nos. 1-200), Library of Congress, at 1-3, 4.

and proceedings of all courts-martial and military commissions, and where a record shall be kept of all proceedings had thereupon.”¹²⁶

Legislation in 1863 provided that in time of war, insurrection, or rebellion, certain offenses “shall be punishable by the sentence of a general court-martial or military commission,” when committed by persons who were members of the military service and subject to the Articles of War.¹²⁷ This section did not give tribunals jurisdiction over citizens who were not in the military. The statute also provided that all persons, in time of war or rebellion against the United States, found lurking as spies in or about any U.S. fortifications, posts, quarters, or encampments “shall be triable by a general court-martial or military commission, and shall, upon conviction, suffer death.”¹²⁸

An 1864 statute dealt with the Quartermaster’s Department and inspectors, who were expected to perform their duties in “a faithful and impartial manner.” For any corruption, wilful neglect, or fraud in their official conduct, they were liable to punishment for fine and imprisonment, “by sentence of court-martial or military commission.”¹²⁹ Another 1864 statute made mention of military commissions.¹³⁰

The Dakota Trials

In 1862, hostilities broke out between American settlers in Minnesota and the Dakota (or Sioux) community. Five weeks of fighting resulted in the deaths of 77 American soldiers, 29 citizen-soldiers, approximately 358 settlers, and an estimated 29 Dakota.¹³¹ Col. Henry H. Sibley created a five-member military tribunal to investigate the incidents and pass judgment, even though all members of the tribunal had fought against the Dakota.¹³² The tribunal convicted 323 and recommended the hanging of 303.

President 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 tribunals, “no sentence of death, or imprisonment in the penitentiary, shall be carried into execution until the same shall have been approved by the President.”¹³³ Maj. Gen. John Pope, Sibley’s commanding officer, telegraphed Lincoln on November 11, warning that if the

¹²⁶ 12 Stat. 598, sec. 5 (1862).

¹²⁷ *Id.* at 736, sec. 30 (1863).

¹²⁸ *Id.* at 737, sec. 38.

¹²⁹ 13 Stat. 397, sec. 6 (1864).

¹³⁰ *Id.* at 356. ch. 215, sec. 1 (1864).

¹³¹ Carol Chomsky, “The United States-Dakota War Trials: A Study in Military Injustice,” 43 *Stan. L. Rev.* 13, 21-22 (1990).

¹³² *Id.* at 22-24.

¹³³ 12 Stat. 698, sec. 5 (1862).

condemned were not executed, there would be “an indiscriminate massacre” of 1,500 women, children, and elderly Indians still held prisoner.¹³⁴

Lincoln adopted this general policy: “Anxious to not act with so much clemency as to encourage another outbreak, on the one hand, nor with so much severity as to be real cruelty, on the other, I caused a careful examination of the records of trials to be made, in view of first ordering the execution of such as had been proved guilty of violating females.”¹³⁵ Only two examples of that category surfaced. He then directed that the examination look for those “who were proven to have participated in *massacres*, as distinguished from participation in *battles*.”¹³⁶ That class, included the two convicted of female violation, numbered 40. For one of the violators, the tribunal recommended a jail sentence of ten years.¹³⁷ This leniency resulted when the individual turned state’s evidence against other defendants. He served three years in prison before being released.¹³⁸

Out of the 303 slated for execution, Lincoln ordered the death sentence for 39 and commuted or pardoned the rest.¹³⁹ Because subsequent evidence cast doubt on the guilt of one of the accused, 38 were executed.¹⁴⁰ Congress later passed legislation to provide funds for the relief of persons damaged by the Sioux Indians and also for the Indians who gave assistance to white men, women, and children.¹⁴¹

The tribunals for the Dakota trials have been the subject of several critiques, partly because of the accelerated nature of the proceedings (some lasting five minutes) and the prejudice of tribunal members. Counsel was not provided to the defendants, even for those who had little command of English.¹⁴² There is also a question whether Col. Sibley possessed authority to convene the tribunal. Article of War 65 provided that in cases of capital crimes, the officer who convened a court-martial could not also be the accuser. General Pope and Judge Advocate General Holt concluded that Sibley was an accuser, “and Sibley did not disagree.”¹⁴³ Sibley’s defense was that Article 65 applied only to the court-martial of an inferior soldier, not to a military tribunal of outsiders. Yet the army had determined, by January 1, 1862, that military tribunals should be conducted with the same procedures as courts-

¹³⁴ 1:13 War of the Rebellion 788.

¹³⁵ S. Ex. Doc. No. 7, 37th Cong., 3d Sess. 1 (1862).

¹³⁶ Id. at 1-2 (emphasis in original).

¹³⁷ Id. at 2. This document also appears at 5 Lincoln 550-51.

¹³⁸ Kenneth Carley, *The Sioux Uprising of 1862*, at 68 (1976).

¹³⁹ S. Ex. Doc. No. 7, at 2, 6-7.

¹⁴⁰ Chomsky, “The United States-Dakota War Trials,” at 34. See also David A. Nichols, *Lincoln and the Indians; Civil War Policy and Politics* 94-118 (1978).

¹⁴¹ 13 Stat. 92-93 (1864); 13 Stat. 427 (1865).

¹⁴² Chomsky, “The United States-Dakota Trials,” at 52-53.

¹⁴³ Id. at 56.

martial.¹⁴⁴ Whether for soldiers or for outsiders, the purpose of Article 65 was to prevent actual or perceived bias.

Judicial Review

Decisions by military tribunals during the Civil War were reviewed by some federal courts, the most prominent cases involving John Merryman, Clement Vallandigham, and Lambdin Milligan. During the war, it became clear that courts would have little role in placing constraints either on martial law or military tribunals. Only after the war did courts begin to assert their independence and impose some limits on executive actions.

John Merryman

John Merryman was suspected of being the captain of a secession group and giving assistance to plans to destroy railroads and bridges. He was arrested by military authorities on May 25, 1861 and imprisoned at Fort McHenry in Baltimore, Md. His counsel sought a writ of habeas corpus from Chief Justice Roger Taney, sitting as circuit judge. On the following day, Taney issued the writ to the commandant of the fort, directing him to bring Merryman to the circuit court room in Baltimore on May 27. The commandant declined to produce Merryman. Taney then prepared an attachment to hold the commandant in contempt, but the court's marshal was unable to enter the gate of the prison to serve the writ.¹⁴⁵

Taney wrote an opinion that expressed his views on presidential power and constitutional procedures. He concluded that a military officer had no right to arrest and detain a person “not subject to the rules and articles of war, for an offence against the laws of the United States, except in aid of the judicial authority, and subject to its control.” For that reason, Merryman was “entitled to be set at liberty and discharged immediately from imprisonment.”¹⁴⁶ He also stated his opinion that the Constitution gave Congress, not the President, the power to suspend the privilege of the writ.¹⁴⁷ Noting that his order “has been resisted by a force too strong for me to overcome,” he directed his clerk to transmit a copy of his order to Lincoln, where it would remain “for that high officer, in fulfillment of his constitutional obligation to ‘take care that the laws be faithfully executed.’ to determine what measures he will take to cause the civil process of the United States to be respected and enforced.”¹⁴⁸

¹⁴⁴ *Id.* at 56, n. 269.

¹⁴⁵ *Ex parte Merryman*, 17 Fed. Cas. 144, 147 (No. 9,487) (D.C. Md. 1861).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 148.

¹⁴⁸ *Id.* at 153.

Merryman was not brought before a military tribunal. Instead, he was indicted in a civil court for treason or conspiracy to commit treason and released on bail, at \$40,000. He was never brought to trial.¹⁴⁹

Clement Vallandigham

On April 13, 1863, General Ambrose Burnside issued General Order No. 38, warning that the death penalty would be imposed on those who not only gave physical aid to the Confederacy but even expressed “sympathies” for the enemy.¹⁵⁰ Less than a month later, on May 5, military authorities arrested Clement L. Vallandigham and charged that in a public speech four days earlier he had expressed sympathy for the South and uttered “disloyal sentiments and opinions, with the object and purpose of weakening the power of the Government in its efforts for the suppression of an unlawful rebellion.”¹⁵¹ His speech described the Civil War as “wicked, cruel, and unnecessary,” waged not for the preservation of the Union but “for the purpose of crushing our liberty and to erect a despotism,” to free blacks, and enslave whites.¹⁵²

Vallandigham, a former Member of Congress from Ohio, was tried before a military tribunal. In his testimony he denied that the tribunal had jurisdiction over him since he was not in the land or naval forces or in the militia. He insisted that he be tried before a civil court with customary constitutional rights and protections. Moreover, he said that the charge brought by the tribunal was not known to the Constitution or to federal law, and that his criticism of government policy was delivered at an open and public meeting, lawfully and peaceably assembled, upon full notice.¹⁵³

The tribunal found him guilty except for his comments that Lincoln and his officers had rejected peaceful overthrows to win back the southern states, and that the administration was attempting to establish a despotism “more oppressive than ever existed before.” He was placed in close confinement in a federal fort, to be held there for the duration of the war. After General Burnside approved the finding and sentence, Lincoln commuted the sentence and ordered the Army to put Vallandigham beyond the Union’s military lines.¹⁵⁴

During the course of his confinement, Vallandigham sought a writ of habeas corpus from the Supreme Court, which concluded that the petition to hear the case “we think not to be within the letter or spirit of the grants of appellate jurisdiction to

¹⁴⁹ Carl B. Swisher, *The Taney Period, 1836-64*, at 853-54 (1974); Dean Sprague, *Freedom Under Lincoln* 43-44 (1965).

¹⁵⁰ Michael Kent Curtis, “Lincoln, Vallandigham, and Anti-War Speech in the Civil War,” *7 Wm. & Mary Bill Rts. J.* 105, 119 (1998).

¹⁵¹ *Ex parte Vallandigham*, 1 Wall. (68 U.S.) 243, 244 (1864).

¹⁵² *Id.*

¹⁵³ *Id.* at 246.

¹⁵⁴ *Id.* at 247-48.

the Supreme Court.” Nor were the operations of a military tribunal covered by the “law or equity” provision of Article III of the Constitution, or within the meaning of Section 14 of the Judiciary Act of 1789.¹⁵⁵ Under this reasoning, the Court held that it had no jurisdiction to review the proceedings of a military tribunal.¹⁵⁶

The Milligan Case

In 1864, military authorities arrested Lambdin P. Milligan, a U.S. citizen from Indiana, on charges of conspiracy. Found guilty before a military tribunal, he was sentenced to be hanged.¹⁵⁷ He presented a petition of habeas corpus to a federal judge, asking that he be discharged because the military lacked jurisdiction over him. He argued that he was entitled to trial by jury before a civilian court. By the time the case reached the Supreme Court, the Civil War was over. The Court ruled 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.¹⁵⁸ The Court held that the statute of March 3, 1863 gave federal courts “complete jurisdiction to adjudicate upon this case.”¹⁵⁹ Milligan’s trial and conviction by a tribunal “was illegal” and under the terms of the statute he was entitled to be discharged from custody.¹⁶⁰

Four Justices dissented, but not on the Court’s jurisdiction to hear and decide the case. On that point they agreed with the majority.¹⁶¹ The dissenting Justices regarded the matter completely settled by the March 3, 1863 legislation.¹⁶² They disagreed only on the broad claim of the Court that military tribunals could not operate when civil courts were open and functioning, and that it was not in the power of Congress to authorize tribunals during such periods. To the minority, Congress “had power, though not exercised, to authorize the military commission which was held in Indiana.”¹⁶³

In response to this decision, Congress passed legislation to limit the Court’s jurisdiction to hear cases involving military law. Despite the fact that civil lawsuits were already pending regarding the conduct of U.S. officials during and immediately after the war, Congress gave indemnity to all officials who implemented presidential proclamations from March 4, 1861 to June 30, 1866, with respect to martial law and military trials. The statute provided: “And no civil court of the United States, or of any State, or of the District of Columbia, or of any district or territory of the United

¹⁵⁵ Id. at 251.

¹⁵⁶ Id. at 253-54.

¹⁵⁷ 2:8 War of the Rebellion 6-11, 543-49.

¹⁵⁸ Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866).

¹⁵⁹ Id. at 117.

¹⁶⁰ Id. at 130, 131.

¹⁶¹ Id. at 132.

¹⁶² Id. at 133.

¹⁶³ Id. at 137.

States, shall have or take jurisdiction of, or in any manner reverse any of the proceedings had or acts done as aforesaid.”¹⁶⁴

Milligan appeared to prohibit military tribunals when civil courts were operating, but tribunals continued to function in the South under martial law during the Reconstruction period. From the end of April 1865 to January 1, 1869, there were 1,435 trials by military tribunals and others occurred in Texas and Mississippi in 1869 and 1870.¹⁶⁵

Other Judicial Rulings

A number of district and circuit courts examined the legality of habeas corpus suspensions during the Civil War. In 1862, a district court held that the President is not vested by the Constitution with power to suspend the privilege of the writ of habeas corpus at any time, without the authority of an act of Congress.¹⁶⁶ Also in 1862, a circuit court in Vermont held that the War Department had no authority to issue an order suspending the writ of habeas corpus. At the time, neither Congress nor the President had declared that the public safety required the establishment of martial law or the suspension of habeas corpus in loyal states.¹⁶⁷

In 1863, after Congress had passed the statute of March 3, 1863, two district courts upheld Lincoln’s actions. In the first, the court ruled that his proclamation of September 15, 1863, suspending the writ, was “valid and efficient in law.”¹⁶⁸ Lincoln grounded his proclamation on the March 3, 1863 statute.¹⁶⁹ Similarly, a district court in Massachusetts looked to the broad language of the statute as reason to alleviate judicial concern. The statutory grant of authority was total: “No case is excepted. Not one is withheld from the operation of this power. All come within its scope, and the cases now before me are clearly comprehended in this language.”¹⁷⁰

After the war was over, federal courts became less tolerant of military tribunals that operated without specific statutory authority. In 1866, a circuit court in New York remarked that a trial before tribunal took place seven months after hostilities had terminated and the rebel army had surrendered, and that the trial “was not had under the rules and articles of war, as established by the United States in congress assembled.”¹⁷¹ The court described martial law as “neither more nor less than the

¹⁶⁴ 14 Stat. 432, 433 (1867).

¹⁶⁵ Mark E. Neely, Jr., *The Fate of Liberty: Abraham Lincoln and Civil Liberties 176-77* (1991).

¹⁶⁶ *Ex parte Benedict*, 3 Fed. Cas. 159 (No. 1,292) (D. N.Y. 1862).

¹⁶⁷ *Ex parte Field*, 9 Fed. Cas. 1, 3 (No. 4,761) (C.C. Vt. 1862).

¹⁶⁸ *In re Dunn*, 8 Fed. Cas. 93 (No. 4,171) (S.D. N.Y. 1863).

¹⁶⁹ 3 Stat. 734 (1863).

¹⁷⁰ *In re Fagan*, 8 Fed. Cas. 947, 949 (No. 4,604) (D. Mass. 1863).

¹⁷¹ *In re Egan*, 8 Fed. Cas. 367 (No. 4,303) (C.C. N.Y. 1866).

will of the general who commands the army. . . . The commander is the legislator, judge, and executioner.”¹⁷²

Captain Henry Wirz

A nine-member military tribunal convened at Washington, D.C. on August 23, 1865 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.”¹⁷³ Thousands of Union soldiers held in this Georgia prison died from overcrowding, sun exposure, inadequate food, polluted water, lack of medicine, and disease. Both sides, prosecution and defense, conceded that conditions at the prison were inhumane.

The focus at the trial should have been on establishing the personal culpability of Captain Henry Wirz, superintendent of the prison. Yet the prosecution used a broad brush to make him responsible for many evils of the Civil War, including the assassination of Lincoln. The presentation by Judge Advocate General Holt ranged far and wide:

When we remember that the men here charged, and those inculpated, but not named in the indictment, are some of them men who were at the head of the late rebellion, from its beginning to its close, and as such chiefs, sanctioned the brutal conduct of their soldiers as early as the first battle of Bull Run; . . . who sanctioned a guerilla [sic] mode of warfare; who instilled a system of steamboat burning and firing of cities; who employed a surgeon in their service to steal into our capital city infected clothing; . . . who organized and carried to a successful termination a most diabolical conspiracy to assassinate the President of the United States — when we remember these things of these men, may we not without hesitancy bring to light the conspiracy here charged?¹⁷⁴

Holt reminded the tribunal members of the efforts of John A. Bingham, who “delivered for the prosecution in the trial of the conspirators for the assassination of President Lincoln” the argument on conspiracies.¹⁷⁵ Lincoln’s assassination had the effect of canceling the initial public support for mercy toward the South and replacing it with “a demand for vengeance,” not only against those who conspired against Lincoln “but against all the former leaders of the Confederacy.”¹⁷⁶ Secretary of War Stanton helped promote the idea of a conspiracy in the South, directed by Jefferson Davis and the Confederacy, that supplied the driving force for the

¹⁷² *Id.*

¹⁷³ Lewis L. Laska and James M. Smith, “‘Hell and the Devil’: Andersonville and the Trial of Captain Henry Wirz, C.S.A., 1865,” 68 *Mil. L. Rev.* 77, 78 (1975).

¹⁷⁴ H. Ex. Doc. No. 23, 40th Cong., 2nd sess. 749 (1967).

¹⁷⁵ *Id.* at 749-50.

¹⁷⁶ Laska and Smith, “‘Hell and the Devil’,” at 83.

assassination of Lincoln.¹⁷⁷ When evidence for that theory could not be assembled,¹⁷⁸ there remained a determination to make some southerners pay a price.

The weight of that prejudice fell on Wirz.¹⁷⁹ He was “hurried to his death by vindictive politicians, an unbridled press, and a nation thirsty for revenge.”¹⁸⁰ John Howard Stibbs, one of the nine members of the tribunal, published an article in 1911 recounting his experience. He said that the evidence presented at the trial “satisfied the Court beyond a doubt that while this prison was being made ready, if not before, a conspiracy was entered into by certain persons, high in authority in the Confederate service, to destroy the lives of our men, or at least subject them to such hardships as would render them unfit for further military service.”¹⁸¹ The target of the trial was therefore not Wirz but the “conspiracy.” Unable to substantiate the latter, the tribunal settled on Wirz.

The documentary record reveals efforts by Wirz to improve camp conditions. When he arrived at the prison in early 1864, drainage of the grounds had been neglected and there were inadequate shelters.¹⁸² His dispatches to headquarters called attention to the poor quality of bread and requested equipment to correct conditions at the camp.¹⁸³ He attempted to construct dams that would subdivide a stream running through the prison into areas for drinking, bathing, and sanitation, but lacked the materials to complete the job.¹⁸⁴

Col. A. C. Chandler, who visited the camp as a Union officer during the war and identified a number of deficiencies,¹⁸⁵ said that Wirz was “entitled to commendation for his untiring energy and devotion to the multifarious duties of his position, for which he is pre-eminently qualified.”¹⁸⁶ He joined General J. H. Winder in recommending Wirz for promotion. The person Chandler wanted removed from duty was not Wirz but Winder. At the trial, Chandler described Winder as “very

¹⁷⁷ Darrett B. Rutman, “The War Crimes and Trial of Henry Wirz,” 6 *Civil War Hist.* 117, 121 (1960).

¹⁷⁸ William Hanchett, *The Lincoln Murder Conspiracies* 78-82 (1986).

¹⁷⁹ The two charges (the second containing 13 specifications) are reproduced at 1:8 *War of the Rebellion* 785-89.

¹⁸⁰ Rutman, *The War Crimes and Trial of Henry Wirz*,” at 118.

¹⁸¹ John Howard Stibbs, “Andersonville and the Trial of Henry Wirz,” 9 *Iowa J. Hist. & Pol.* 33, 35 (1911).

¹⁸² 2:7 *War of the Rebellion* 167-68.

¹⁸³ *Id.* at 207, 521.

¹⁸⁴ Rutman, “The War Crimes and Trial of Henry Wirz,” at 119. See also Laska and Smith, “‘Hell and the Devil’,” at 115.

¹⁸⁵ H. Ex. Doc. No. 23, at 224-50.

¹⁸⁶ *Id.* at 226 (Chandler report of August 5, 1864).

indifferent to the welfare of the prisoners, indisposed to do anything, or to do as much as I thought he ought to do, to alleviate their sufferings.”¹⁸⁷

Chandler told the tribunal that during one of his visits to Andersonville, he decided to make inquiries directly of the prisoners. Having been a prisoner himself, he knew the “unwillingness of prisoners to make complaints in the presence of those who have power over them, and for that reason, I took the men aside and questioned them so that Wirz could not hear me as to any complaints they had to make, and none of them made any complaints against him.”¹⁸⁸

At the trial, Wirz was found guilty on most of the charges.¹⁸⁹ President Andrew Johnson approved the proceedings and sentences and ordered that Wirz be hanged on November 10, 1865. The execution was carried out as ordered, with Wirz’s body interred in Washington, D.C. by the side of one of the Lincoln conspirators, George A. Atzerodt.¹⁹⁰

Conspirators of Lincoln’s Assassination

The most controversial Civil War tribunal was the trial of eight people charged with conspiring to assassinate President Lincoln. On May 1, 1865, President Johnson ordered nine military officers to serve on the tribunal to try the suspects, even though civil courts were open and operating.¹⁹¹ The tribunal convened on May 9 to try seven men and one woman: David E. Herold, G. A. Atzerodt, Lewis Payne, Mary E. Surratt, Michael O’Laughlin, Edward Spangler, Samuel Arnold, and Samuel A. Mudd.¹⁹² They were charged with conspiring to kill Lincoln, Vice President Johnson, Secretary of State William H. Seward, and General Ulysses S. Grant.¹⁹³

Four received prison sentences and four were sentenced to death by public hanging: Herold, Atzerodt, Payne, and Surratt.¹⁹⁴ Johnson approved the sentences on July 5 and ordered the executions to take place two days later.¹⁹⁵ On the morning of the scheduled executions, Surratt’s attorneys applied for and received a writ of

¹⁸⁷ Id. at 240.

¹⁸⁸ Id.

¹⁸⁹ He was found guilty of the first charge (conspiracy) and of ten out of 13 specifications of the second charge (murder); 2:8 War of the Rebellion 791.

¹⁹⁰ H. Ex. Doc. No. 23, at 815.

¹⁹¹ 8 Richardson 3532-33.

¹⁹² Id. at 3540.

¹⁹³ Id. at 3540-41.

¹⁹⁴ Id. at 3543-45.

¹⁹⁵ 8 Richardson 3545-46; 8 The Papers of Andrew Johnson 357 (1989).

habeas corpus, but Attorney General James Speed advised the civil court that Johnson had suspended the writ.¹⁹⁶

Johnson asked Speed for a legal opinion on whether the persons charged with conspiracy could be tried before a military tribunal or must be tried before a civil court. Speed acknowledged that although martial law had been declared in the District of Columbia at the time of Lincoln's assassination, "the civil courts were open and held their regular sessions, and transacted business as in times of peace."¹⁹⁷ Yet Speed concluded that the conspirators "not only may but ought to be tried by a military tribunal."¹⁹⁸ It was within the power of Congress to prescribe how tribunals "are to be constituted, what shall be their jurisdiction, and mode of procedure." If Congress failed to create such tribunals, "then, under the Constitution, they must be constituted according to the laws and usages of civilized warfare."¹⁹⁹

Speed further reasoned that "when war comes, the laws of war come with it," and Presidents had substantial constitutional authority to act under the laws of war.²⁰⁰ Some of the offences against the laws of war are crimes, punishable in the civil courts, "and some not."²⁰¹ He recognized that murder (and attempted murder) are crimes punishable in the civil courts, but added that "in committing the murder an offence may also have been committed against the laws of war; for that offence he must answer to the laws of war, and the tribunals legalized by that law."²⁰²

Speed did not explain why murder or attempted murder could not, or should not, be tried in civil court. He said that the fact that civil courts "are open does not affect the right of the military tribunal to hold as a prisoner and to try." 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."²⁰³ The analogy here is strained. Courts are created to try offenders, not to engage in military operations.

Opinions of the Attorney General usually have a specific date: month, day, and year. Speed's opinion is merely marked "July, 1865," which is two months after President Johnson created the tribunal and the same month that the tribunal rendered its verdicts and carried out the hangings. Given the timing of Speed's opinion, it

¹⁹⁶ 16 The Papers of Andrew Johnson 486 (2000); William Hanchett, *The Lincoln Murder Conspiracies*, at 70.

¹⁹⁷ 11 Op. Att'y Gen. 297, 297 (1865).

¹⁹⁸ *Id.* at 298.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 312.

²⁰¹ *Id.*

²⁰² *Id.* at 312-13.

²⁰³ *Id.* at 315.

appears to be an after-the-fact analysis to justify not what could happen, legally, but what had happened or was about to happen.²⁰⁴

Edward Bates, who served as Attorney General under Lincoln from 1861 to 1863, held a low opinion of Speed. He said Speed came into office “with not much reputation as a lawyer, and perhaps, no strong confidence in his own opinions,” vulnerable to falling under the influence of Cabinet officers such as Secretary of War Stanton and Secretary of State Seward, “to give such opinions as were wanted!”²⁰⁵ Bates considered the military tribunal for the conspirators 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.”²⁰⁶

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.”²⁰⁷ Courts-martial, he said, exist because of a statute enacted by Congress “and the members thereof have *legal* duties and rights,” whereas military tribunals “exist only by the will of the commander, and that will is their known rule of proceeding.”²⁰⁸ Judge R. A. Watts, who served as Acting Assistant Adjutant General at the trial, described the tribunal as “a law unto itself. It made its own rules of procedure. It was the sole judge of the law, as well as of the facts. . . It was empowered not only to decide the question of guilt but it also had the power, and it was its duty, to fix the penalties.”²⁰⁹

Clemency for Surratt

The public hanging of Mary Surratt created a political embarrassment for President Johnson. Several years after her execution, Judge Advocate General Holt claimed that he presented Johnson with a petition, signed by five members of the military tribunal, recommending that in consideration of her age and gender she be imprisoned for life rather than hanged. Johnson denied that he had seen the document or had anyone discuss it “until some days *after*, the Execution of Mrs. Surratt.”²¹⁰ Public knowledge that a majority of the tribunal had recommended

²⁰⁴ For a severe critique of Speed’s opinion by former Attorney General Edward Bates, see Howard K. Beale, *The Diary of Edward Bates, 1859-1866*, at 498-503 (1933).

²⁰⁵ *Id.* at 483.

²⁰⁶ *Id.* (emphasis in original).

²⁰⁷ *Id.* at 502 (emphasis in original).

²⁰⁸ *Id.* (emphasis in original).

²⁰⁹ Judge R. A. Watts, “The Trial and Execution of the Lincoln Conspirators,” 6 *Mich. Hist. Mag.* 81, 99 (1922).

²¹⁰ 16 *The Papers of Andrew Johnson* 440 (2000) (emphasis in original) William Hanchett, *The Lincoln Murder Conspiracies*, at 87-88.

imprisonment for Surratt sparked a “growing sentiment that she had been unjustly put to death.”²¹¹

Johnson’s presidential term ended on March 4, 1869. Returning to Tennessee, he decided in 1872 to run for Congress. During the campaign, Holt published a lengthy article on August 26, 1873, insisting that he had presented the clemency petition to Johnson and it had been discussed with several members of the Cabinet, after which Johnson decided that execution was the proper course.²¹² Holt tried unsuccessfully to get Speed to comment publicly on Johnson’s handling of the petition.²¹³

Johnson published a lengthy rebuttal on November 11, 1873, disputing Holt’s account of the clemency offer.²¹⁴ Johnson said that only after there had been public notice of the petition had he sent for the papers on August 5, 1867, more than two years after the executions.²¹⁵ If Holt in 1867 had disagreed with Johnson on the presentation of the petition, Johnson asked why Holt had not issued an immediate challenge and sought the corroboration of Stanton and Seward while they were alive. By 1873, both were dead.

Samuel A. Mudd

In recent decades, portions of the Lincoln conspiracy trial were replayed in federal court. Samuel A. Mudd, found guilty of harboring some of the conspirators, was sentenced to be imprisoned at hard labor for life.²¹⁶ In 1868, a district court in Florida held that his case was properly tried by a military tribunal.²¹⁷ On February 8, 1869, however, President Johnson granted Mudd a full and unconditional pardon.²¹⁸

More than a century later, Mudd’s grandson challenged the jurisdiction of the military tribunal that convicted the Lincoln conspirators. In 1992, the Army Board for Correction of Military Records noted that Mudd never served in the military, was

²¹¹ Hanchett, *The Lincoln Murder Conspiracies*, at 88.

²¹² *Vindication of Hon. Joseph Holt, Judge Advocate General of the United States Army (1873)*.

²¹³ Allen Thorndike Rice, “New Facts About Mrs. Surratt,” 147 *No. Am. Rev.* 83 (1888). See also documents put together by Speed’s son, John Speed: “The Assassins of Lincoln,” 147 *No. Am. Rev.* 314 (1888). For other commentary on the trial see John W. Curran, “Lincoln Conspiracy Trial and Military Jurisdiction over Civilians,” 9 *Notre Dame Lawyer* 26 (1933), and Thomas R. Turner, “What Type of Trial: A Civil Versus a Military Trial for the Lincoln Assassination Conspirators,” 4 *Papers of the Abraham Lincoln Association* 29 (1982).

²¹⁴ 16 *The Papers of Andrew Johnson* 475-89 (2000).

²¹⁵ *Id.* at 483-84.

²¹⁶ 8 *Richardson* 3545.

²¹⁷ *Ex parte Mudd*, 17 *Fed. Cas.* 954 (No. 9,899) (D. Fla. 1868).

²¹⁸ *Andrew Johnson Papers*, Library of Congress, Reel 50, Series 8C; 15 *The Papers of Andrew Johnson* 424 (1999).

a civilian at the time of Lincoln's assassination, and lived in the non-secessionist state of Maryland. It concluded that the tribunal, lacking jurisdiction to try Mudd, "denied him his due process rights, particularly his right to trial by a jury of his peers," and that this denial "constituted such a gross infringement of his constitutionally protected rights, that his conviction should be set aside. To fail to do so would be unjust."²¹⁹

A federal district court in 1998 ruled that the Johnson pardon did not make the Mudd case moot and that the rejection by the Secretary of the Army of the board's recommendation was unsupported by substantial evidence in the record.²²⁰ In a subsequent decision, the court held that the military tribunal had jurisdiction to try Mudd for violations of laws of war.²²¹ Mudd's grandson died on May 21, 2002.²²² Later that year, the D.C. Circuit dismissed the suit because the descendants of Dr. Mudd who attempted to clear his name lacked standing.²²³

From the Civil War to World War II

After the Civil War, the United States made little use of military tribunals until World War II. As a result of the Spanish-American War of 1898, the United States acquired the Philippines. Although the American occupation was initially welcomed, Filipino nationalists opposed colonial status under U.S. rule. A pro-independence uprising in 1899 led to a protracted and bitter guerrilla war that continued through 1902.

U.S. military commander General Arthur MacArthur placed the Philippines under martial law and relied on a mix of military tribunals and Army provost courts to discipline the local population.²²⁴ Reports of U.S. atrocities against Filipino prisoners prompted Senate hearings in 1902. Senator Thomas Patterson asked this question: "When a war is conducted by a superior race against those whom they consider inferior in the scale of civilization, is it not the experience of the world that the superior race will almost involuntarily practice inhuman conduct?" William Howard Taft, the civil governor of the Philippine Islands, responded: "There is much greater danger in such a case than in dealing with whites. There is no doubt about

²¹⁹ Mudd v. Caldera, 26 F.Supp.2d 113, 117 (D.D.C. 1998).

²²⁰ Id. at 119-23.

²²¹ Mudd v. Caldera, 134 F.Supp.2d 138 (D.D.C. 2001). See John Paul Jones, ed., *Dr. Mudd and the Lincoln Assassination: The Case Reopened* (1995).

²²² "Richard D. Mudd, 101; Grandson of Booth Doctor," *Washington Post*, May 22, 2002, at B7.

²²³ Mudd v. White, 309 F.3d 819 (D.C. Cir. 2002); Neil A. Lewis, "Suit to Clear Doctor Who Treated Booth Is Dismissed," *New York Times*, November 9, 2002, at A13.

²²⁴ Brian McAllister Linn, *The U.S. Army and Counterinsurgency in the Philippine War, 1899-1902*, at 23-25, 55-56 (1989).

that.”²²⁵ The hearings called attention to a number of atrocities committed by the American forces.²²⁶

After enacting the Articles of War in 1806, Congress did not subject them to comprehensive revision for more than a century. The process began in 1912 when the House Committee on Military Affairs held hearings to consider a bill designed to revise the Articles. Secretary of War Henry L. Stimson told the committee that the existing Articles were “notoriously unsystematic and unscientific.”²²⁷ At these hearings, Judge Advocate General E. H. Crowder drew attention to an “entirely new” Article on military commissions, a type of court that had never been “formally authorized by statute” but was an institution “of the greatest importance in a period of war and should be preserved.”²²⁸ Asked what he meant by this tribunal, he described it as a “common law of war court” never regulated by statute.²²⁹ As he put it at subsequent hearings, these war courts grew out of “usage and necessity.”²³⁰

A piecemeal revision of the Articles of War in 1913 seems to challenge the unique jurisdiction of military tribunals to handle disputes over the law of war. New language gave general courts-martial the power to try any person subject to military law for any crime punishable by the Articles of War, but also jurisdiction over “any other person who by statute or by the law of war is subject to trial by military tribunals.”²³¹ That language would reappear in the Articles of War enacted in 1916 and 1920.²³² Did this statutory provision eliminate the need for military tribunals?

Seeking to forestall that interpretation, Crowder fashioned language to assure that conferring jurisdiction on general courts-martial over the law of war did not deprive military tribunals of concurrent jurisdiction. Because he expected the jurisdictions of courts-martial and tribunals to frequently overlap, and questions would naturally arise as to whether congressional action in vesting jurisdiction by statute in courts-martial would eliminate the need for tribunals, he wanted to make “it perfectly plain by the new article that in such cases the jurisdiction of the war court is concurrent.”²³³

²²⁵ “Affairs in the Philippine Islands,” hearings before the Senate Committee on the Philippines, 57th Cong., 1st Sess. 77 (1902).

²²⁶ *Id.* at 559. See Richard E. Welch, Jr., “American Atrocities in the Philippines: The Indictment and the Response,” 43 *Pac. Hist. Rev.* 233 (1974).

²²⁷ “Revision of the Articles of War,” hearing before the House Committee on Military Affairs, 62d Cong., 2d Sess. 3 (1912).

²²⁸ *Id.* at 29.

²²⁹ *Id.* at 35.

²³⁰ S. Rept. No 130, 64th Cong., 1st Sess. 41 (1916). This report includes the transcript of the hearings.

²³¹ 37 Stat. 722 (1913).

²³² 39 Stat. 652, Art. 12 (1916); 41 Stat. 789, Art. 12 (1920).

²³³ “Revision of the Articles of War,” hearing before the House Committee on Military Affairs (continued...)

The Senate Committee on Military Affairs reported legislation in 1914 to revise the Articles of War.²³⁴ During floor action the following year, the Articles were added as an amendment to an army appropriations bill.²³⁵ As enacted in 1916, Crowder's Article 15 read:

ART. 15. NOT EXCLUSIVE. — the provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by the law of war may be lawfully triable by such military commissions, provost courts, or other military tribunals.²³⁶

New controversies erupted in 1917 because of charges that military law lacked adequate procedures and opportunities for proper review. Also, several sensational cases were brought forward to highlight excessive punishment of American soldiers during World War I.²³⁷ In 1920, Congress decided to put the new Articles of War not in an appropriations bill, but in an authorization measure called National Defense Act Amendments. As reported by the House Committee on Military Affairs, the National Defense Act did not contain the new Articles.²³⁸ However, the Senate included the Articles in the bill, as did the conferees.²³⁹ The wording of Article 15 was changed slightly. Instead of restricting the Article to offenses under “the law of war,” the new Article covered offenses both by statute and the law of war:

ART. 15. JURISDICTION NOT EXCLUSIVE. — The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions, provost courts, or other military tribunals.²⁴⁰

During Senate hearings in 1916, Crowder testified that courts-martial and military tribunals “have the same procedure.”²⁴¹ That has not been the case. The procedures for courts-martial have been spelled out in statutory Articles of War and

²³³(...continued)

Affairs, 62nd Cong., 2nd sess. at 29.

²³⁴ S. Rept. No. 229, 63rd Cong., 2nd sess. (1914).

²³⁵ 52 Cong. Rec. 4290, 4296-4303 (1915). See also S. Rept. No. 130, 64th Cong., 1st sess. (1916) and 53 Cong. Rec. 11474, 11504-13 (1916).

²³⁶ 39 Stat. 653 (1916).

²³⁷ Herbert F. Margulies, “The Articles of War, 1920: The History of a Forgotten Reform,” 43 Mil. Aff. 85 (1979).

²³⁸ H. Rept. No. 680, 66th Cong., 2nd sess. (1920).

²³⁹ H. Rept. No. 1049, 66th Cong., 2nd sess. 66 (1920); 59 Cong. Rec. 7834 (1920).

²⁴⁰ 41 Stat. 790 (1920).

²⁴¹ S. Rept. No. 130, 64th Cong., 1st sess. 40 (1916). This report reprints the transcript of the hearings.

in the *Manual for Courts-Martial*. Military tribunals have been relatively free in adopting what ever procedures they like, even adopting them after a trial is underway.

Part of the Articles of War in 1920 appeared to restrict what a President may do in adopting procedures for military tribunals. Article 38 authorized the President to prescribe, by regulations, “which he may modify from time to time,” the rules for cases before courts-martial, courts of inquiry, military commissions, and other military tribunals. Congress directed that these regulations “shall, in so far as he shall deem practicable, apply the rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States.” Moreover, “nothing contrary to or inconsistent with these articles shall be so prescribed.” All rules made pursuant to Article 38 were to be placed before Congress each year.²⁴² Those provisions imposed certain rules and standards on the President. In subsequent military tribunals, including the trial of the German saboteurs in 1942 and the Yamashita case in 1945, Presidents and military commanders devised rules and procedures that departed widely from these earlier statutory standards.

During World War I, Lothar Witzke entered the United States at the Mexican border. Although he had a Russian passport, he was a German spy using the alias Pablo Waberski on a mission to commit sabotage against certain American targets. he was picked up by army officials in Nogales, Arizona and brought to Fort Sam Houston in San Antonio, Texas, where he faced a military tribunal of two brigadier generals and three colonels. He was charged with violation Article of War 82: “Any person who in time of war shall be found lurking or acting as a spy in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, or elsewhere, shall be tried by a general court-martial or by a military commission, and shall, on conviction thereof, suffer death.” Two-thirds of the tribunal — a sufficient number — found him guilty.²⁴³

An opinion by Attorney General Thomas W. Gregory in 1918 understood that Waberski was a Russian national sent to the United States by the German ambassador to Mexico to function as a German agent or spy. It was believed that he intended to explode and wreck munition barges, powder magazines, and other war utilities in the United States. At the moment he touched foot on U.S. territory he was apprehended by military authorities and had not entered any camp, fortification or other U.S. military facility. Martial law had not been declared at Nogales or anywhere else in the United States, and the regular federal civilian courts were functioning in that district.

Relying in part on *Ex parte Milligan*, Gregory concluded that Witzke could not be tried by a military tribunal because he had been apprehended in U.S. territory not

²⁴² 41 Stat. 794 (1920).

²⁴³ Henry Landau, *The Enemy Within: The Inside Story of German Sabotage in America* 112-27 (1937).

under martial law, and had not entered any camp, fortification, or other U.S. military premise.²⁴⁴ Even without *Milligan*, Gregory said, the provisions of the Constitution

would themselves plainly bring us to the same conclusions as those set forth in the opinion of the court in that case, namely, that in this country, military tribunals, whether courts-martial or military commissions, can not constitutionally be granted jurisdiction to try persons charged with acts or offenses committed outside of the field of military operations or territory under martial law or other peculiarly military territory, except members of the military or naval forces or those immediately attached to the forces such as camp followers.²⁴⁵

Gregory also pointed to Article 29 of the Hague Convention of 1917: “A person can only be considered a spy when acting clandestinely or on false pretences [sic] obtains or endeavors to obtain information in the zone of operations of a belligerent with the intent of communicating it to a hostile party.”²⁴⁶ Gregory added: “Obviously Waberski does not fit into these definitions.”²⁴⁷

In the Nazi saboteur case of 1942 (discussed next), defense counsel seized upon Gregory’s opinion to argue that the eight Germans could not be charged with spying if their activities were not in a theatre of operations. Gregory had said: “in this country, military tribunals, whether courts-martial or military commissions, can not constitutionally be granted jurisdiction to try persons charged with acts or offences committed outside of the field of military operations or territory under martial law or other peculiarly military territory, except members of the military or naval forces or those immediately attached to the forces such as camp followers.”²⁴⁸

To minimize the damage done by Gregory’s language, the Justice Department on July 29, 1942 — in the midst of the Nazi saboteur trial — released a previously unpublished Attorney General opinion, dated December 24, 1919, taking the opposite position. Attorney General A. Mitchell Palmer reversed Gregory on the basis of new facts. Witzke was a German citizen, not a Russian national, and it was now determined that he was found “lurking or acting as a spy.” The military tribunal therefore had jurisdiction to try him under Article 82.²⁴⁹ What the defense had relied on in the Nazi saboteur case was now without value.

²⁴⁴ 31 Op. Att’y Gen. 356 (1918).

²⁴⁵ Id. at 361.

²⁴⁶ Id. at 363. Gregory said the Hague Convention of 1917, but he must have meant 1907; 36 Stat. 2303 (1907).

²⁴⁷ 31 Op. Att’y Gen. at 363.

²⁴⁸ Id. at 361. For the defense attorney’s position, see RG 153, Records of the Office of the Judge Advocate General (Army), Court-Martial Case Files, CM 3341178, 1942 German Saboteur Case, National Archives, College Park, Md., at 2796 (hereafter “1942 Military Tribunal”).

²⁴⁹ 40 Op. Att’y Gen. 561 (1919), released for publication July 29, 1942.

The Nazi Saboteur Case

In June 1942, eight German saboteurs reached the United States by submarine, intent on using explosives against railroads, factories, bridges, and other strategic targets. Within a matter of weeks they were rounded up. President Roosevelt issued a proclamation to create a military tribunal, which a month later found the eight men guilty. Before the tribunal could reach a verdict, the Germans sought a writ of habeas corpus from the civil courts. That avenue was blocked when the Supreme Court, in *Ex parte Quirin* (1942), upheld the jurisdiction of the tribunal. Late in 1944 the Roosevelt Administration apprehended two more German spies, but this time it decided that the tribunal of 1942 was fundamentally flawed and selected another type of military proceeding.²⁵⁰

Why a Tribunal?

At the time that FBI agents were interrogating one of the 1942 German spies, George Dasch, they planned to arraign him and the other seven before a district judge and try them in civil court. A tribunal was selected for two reasons. After agreeing to go into civil court and plead guilty, Dasch said he now intended to go into court and tell the entire story, which would include his decision to turn himself in and help the government apprehend his colleagues.²⁵¹ The administration, having taken credit for locating the saboteurs so quickly, did not want it publicly known that one had turned himself in and fingered the others, nor did it want to broadcast how easily German U-boats had reached American shores undetected.

The second reason for a military tribunal was the level of punishment sought by the administration. The statute on sabotage carried a maximum 30-year penalty, but the men had not actually committed sabotage. In his memoirs, Attorney General Francis Biddle concluded that an indictment for attempted sabotage probably would not have been sustained in a civil court “on the ground that the preparations and landings were not close enough to the planned act of sabotage to constitute attempt.”²⁵² Federal prosecutors could add the charge of conspiracy to commit crimes, but the maximum penalty was only three years.²⁵³ Maj. Gen. Myron C. Cramer, Judge Advocate General of the Army, anticipated that a district court would impose a sentence of no more than two years and a fine of \$10,000 for conspiracy to commit a crime.²⁵⁴

²⁵⁰ For greater detail on the Nazi saboteurs, see CRS Report RL31340, *Military Tribunals: The Quirin Precedent*, by Louis Fisher, and Louis Fisher, *Nazi Saboteurs on Trial* (2003).

²⁵¹ 1942 Military Tribunal, at 541-42, 548, 677, 2546.

²⁵² Francis Biddle, *In Brief Authority* 328 (1962).

²⁵³ *Id.*

²⁵⁴ Memorandum for the Assistant Chief of Staff, G-2, June 28, 1942, by Maj. Gen. Myron C. Cramer, at 4, in “German Saboteurs” file, RG 107, Office of the Secretary of War, Stimson “Safe Files,” National Archives, College Park, Md. (hereafter “Stimson’s Safe File”).

President Roosevelt was intent on a death penalty, and for that reason supported a military tribunal. He referred to the death penalty as “almost obligatory.”²⁵⁵ Roosevelt said that “without splitting hairs” he could see no difference between this case and the hanging of Major André. He warned Biddle: “i.e., don’t split hairs, Mr. Attorney General.”²⁵⁶

On July 2, 1942, Roosevelt issued Proclamation 2561 to create a military tribunal. The initial paragraph stated that for the safety of the United States it was necessary to try the eight Germans “in accordance with the law of war.”²⁵⁷ Reference to “law of war” was crucial. Had Roosevelt cited the Articles of War, he could have triggered the statutory procedures established by Congress for courts-martial. The category “law of war,” undefined by statute, represented a more diffuse collection of principles and customs developed in the field of international law. Dating back to Article of War 15 crafted by Judge Advocate General Crowder, Congress took note of the law of war in this manner: “The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.”²⁵⁸

Also on July 2, 1942, Roosevelt issued a military order appointing the members of the tribunal, the prosecutors, and the defense counsel.²⁵⁹ All of the men were subordinate to the President: the seven generals who sat on the tribunal, the two prosecutors (Attorney General Biddle and Judge Advocate General Cramer), and the colonels who served as defense counsel.

The military order empowered 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.” This language freed the tribunal from the specific procedures enacted by Congress and the *Manual for Courts-Martial*. Instead of procedures established in advance, the tribunal would create rules over the course of the trial. Cramer told the tribunal that it had discretion “to do anything it pleases; there is no dispute about that.”²⁶⁰

Roosevelt’s order directed that the trial record, including any judgment or sentence, be transmitted “directly to me for my action thereon.” This marked a significant departure from military trials. Under Articles of War 46 and 50½, any conviction or sentence by a military court was subject to review within the military

²⁵⁵ Memo from Roosevelt to Biddle, June 30, 1942, PSF, “Departmental File, Justice, 1940-44,” Box 46, FDR Library, Hyde Park, N.Y.

²⁵⁶ Biddle, *In Brief Authority*, at 330.

²⁵⁷ 7 Fed. Reg. 5101 (1942).

²⁵⁸ 10 U.S.C. § 821 (2000).

²⁵⁹ 7 Fed. Reg. 5103 (1942).

²⁶⁰ 1942 Military Tribunal, at 991.

system, including the Judge Advocate General's office. That avenue was closed because Cramer participated as co-prosecutor.

The military tribunal met from July 8 to August 1, 1942. The government charged the eight Germans with four crimes: one against the "law of war," two against the Articles of War (81st and 82d), and one involving conspiracy. The first specified that the men, acting on behalf of a belligerent enemy action, "secretly and covertly passed, in civilian dress, contrary to the law of war," through military lines for the purpose of committing acts of sabotage. Article 81 concerned efforts to assist the enemy, including giving intelligence to it. Article 82 referred to persons in time of war "found lurking or acting as a spy" in or about military fortifications and installations.

Interlude in Civil Court

On July 21, the twelfth day of the trial, Col. Kenneth Royall for the defense decided it was time to test the civil courts. He first met with Justice Hugo Black at the Justice's home in Alexandria, Va., leading to a meeting on July 23 at Justice Owen Roberts's farm outside Philadelphia. In attendance at the farm were Biddle, Cramer, Black, and Royall's co-counsel, Col. Cassius M. Dowell. After calling Chief Justice Harlan Fiske Stone and other Justices, the Court agreed to hold oral argument on July 29.²⁶¹

When the tribunal resumed on July 24, Royall could anticipate a hearing by the Supreme Court but he had yet to present the issue to lower courts. He managed to get papers to the district court for a writ of habeas corpus and was turned down on July 28, at 8 p.m. District Judge James W. Morris issued a brief statement denying permission for the writ, stating that the defendants came within a category — subjects, citizens, or residents of a nation at war with the United States — that, under Roosevelt's proclamation, is "not privileged to seek any remedy or maintain any proceedings in the courts of the United States." Judge Morris did not consider *Ex parte Milligan* controlling under the circumstances of the Germans.²⁶²

Oral argument before the Supreme Court began at noon the next day, with the Justices inadequately prepared to decide questions they rarely considered, including the Articles of War and the law of war. The briefs submitted by the two sides are dated July 29, the same day that oral argument began. The Justices and their clerks thus lacked the time to independently research the principal issues. The first difficulty for Royall was to explain how he could be before the Court without action by the appellate court. The Court let Royall proceed after he promised to get papers to the D.C. Circuit.²⁶³

²⁶¹ "The Reminiscences of Kenneth Clairborne Royall," Oral History Research Office, Columbia University, 1964, at 35-38; Fisher, *Nazi Saboteurs on Trial*, at 64-68.

²⁶² *Ex parte Quirin*, 57 F.Supp. 431 (D.C.C. 1942).

²⁶³ "Petition for Writ of Certiorari to the Court of Appeals for the District of Columbia," reprinted in 39 *Landmark Briefs and Arguments of the Supreme Court of the United States* (continued...)

Another problem was the possible disqualification of several Justices because of personal interests. Justice Frank Murphy had already recused himself because of his status as an officer in the military reserves. Chief Justice Stone's son, Lauson, was part of the defense team. Biddle argued that Stone could sit because his son had not participated in the habeas corpus proceedings. Stone asked the defense if they concurred with that argument and Royall replied: "We do."²⁶⁴

There were grounds for Justices Felix Frankfurter and James F. Byrnes to disqualify themselves. On June 29, two days after the eight Germans had been rounded up, Frankfurter reportedly told Secretary of War Henry Stimson over dinner that the contemplated military tribunal should be composed entirely of soldiers, with no civilians included. Long before the Court agreed to hear the case, Frankfurter had already staked out a position that favored the government. Also, Byrnes had been serving as a de facto member of the Roosevelt Administration, working closely with Roosevelt and Biddle by giving advice on draft executive orders, a war powers bill, and offering to get bills out of committee and onto the floor for passage.²⁶⁵ Yet Frankfurter and Byrnes participated in the case.

The 72-page brief submitted by Royall and Dowell challenged the validity of Roosevelt's proclamation creating the tribunal and his military order appointing the tribunal members. The 93-page brief by Biddle and Cramer argued that the eight Germans were not entitled to have access to U.S. courts for the purpose of obtaining writs of habeas corpus. They insisted that the manner of dealing with the saboteurs lay exclusively with the President, and neither Congress nor the judiciary could interfere with his decisions: "The President's power over enemies who enter this country in time of war, as armed invaders intending to commit hostile acts, must be absolute."²⁶⁶ Biddle pressed that point later in oral argument, advising the Court that in some instances a President as Commander in Chief could act in ways that even Congress could not control. Chief Justice Stone interrupted: "We do not have to come to that?" Biddle agreed: "You do not have to come to that."²⁶⁷

Royall took the position that Congress possessed the constitutional authority to legislate on military courts and military tribunals, and that any action by the President contrary to statutory standards would be invalid. He first pointed to language in Article of War 38 that authorized the President, by regulation, to prescribe the procedure for cases before courts-martial, courts of inquiry, military commissions, and other military tribunals, but "nothing contrary to or inconsistent with these Articles shall be so prescribed."²⁶⁸ Royall told the Court that Article 38 directed *the President* to prescribe the rules of procedure. Instead, Roosevelt had transferred that

²⁶³(...continued)
296, 498-500 (1975) (hereafter "Landmark Briefs").

²⁶⁴ Id. at 496-97.

²⁶⁵ Fisher, *Nazi Saboteurs on Trial*, at 95-96.

²⁶⁶ "Brief for the Respondent," *Landmark Briefs* at 423.

²⁶⁷ *Landmark Briefs* at 608.

²⁶⁸ Id. at 550.

function to the military tribunal. Also, the Articles of War required unanimity for a death penalty. Roosevelt's proclamation allowed a two-thirds majority. Royall pointed to the review procedure in Article 46, which required the trial record of a general court-martial or a military tribunal to be referred to a staff judge advocate or the Judge Advocate General for review. Article 50½ provided for examination by a board of review. Yet Roosevelt's proclamation provided that the trial record of the military tribunal come directly to him as the final reviewing authority.

The Per Curiam

After oral argument concluded on July 30, the Justices met in conference to discuss the best course of action. At noon the following day, Chief Justice Stone read a short per curiam that upheld the jurisdiction of the military tribunal. Defense lawyers carried the papers from the D.C. Circuit to the Supreme Court only a few minutes before Stone spoke. The petition for certiorari was not filed in the Court until 11:59 a.m. on July 31. One minute later the Court convened, granted cert, and issued its per curiam decision.²⁶⁹ In granting cert, the Court denied motions for leave to file petitions for writs of habeas corpus and affirmed the decision of the district court.

In announcing its decision, the Court said that it was acting "in advance of the preparation of a full opinion which necessarily will require a considerable period of time for its preparation and which, when prepared, will be filed with the Clerk."²⁷⁰ A quick per curiam was necessary because the work of the tribunal had been put on hold. It took the Court three months to draft a decision that would avoid any concurrences or dissents, even though the Justices were aware that Roosevelt had violated several Articles of War.²⁷¹

The tribunal, which concluded its proceedings on August 1, decided that all eight men were guilty and deserved the death penalty. Roosevelt approved the death penalty for six but chose prison sentences for Dasch and Peter Burger. The six were electrocuted on August 8. With six of the saboteurs dead, the Court's full opinion could not imply that its per curiam rested on questionable legal grounds or that the administration had not acted with full authority. Stone wrote to Frankfurter on September 10 that he found it "very difficult to support the Government's construction of the articles [of war]." He was concerned that it "seems almost brutal to announce this ground of decision for the first time after six of the petitioners have been executed and it is too late for them to raise the question if in fact the articles as they construe them have been violated." Only after the war, he said, would the facts be known, with release of the trial transcripts and other documents to the public. By

²⁶⁹ General Myron C. Cramer, "Military Commissions: Trial of the Eight Saboteurs," 17 Wash. L. Rev. & State Bar. J. 247, 253 (1942).

²⁷⁰ Ex parte Quirin, 63 S.Ct. 1-2 (1942). The per curiam also appears as a footnote in Ex parte Quirin, 317 U.S. 1, 18-19 (1942)

²⁷¹ Fisher, Nazi Saboteurs on Trial, at 109-21.

that time, Dasch and Burger could challenge the proceedings successfully, which “would not place the present Court in a very happy light.”²⁷²

The Full Opinion

Released on October 29, 1942, the full opinion concluded that the secrecy surrounding the trial made it impossible for the Court to judge whether Roosevelt’s proclamation and order violated or were in conflict with the Articles of War.²⁷³ In one his memos, Frankfurter offered the view that “there can be doubt that the President did *not* follow” Articles of War 46 through 53. He had “not a shadow of doubt” that Roosevelt “did not comply with Article 46 *et seq.*”²⁷⁴

The Court’s full opinion chose not to address certain questions. Did Herbert Haupt lose his U.S. citizenship because “he elected to maintain German allegiance and citizenship?”²⁷⁵ The Court found it unnecessary to decide that issue. It also made it clear that it was not concerned “with any question of guilt or innocence of petitioners.”²⁷⁶ It decided that President Roosevelt had exercised authority “conferred upon him by Congress,” as well as whatever authority the Constitution granted the President.²⁷⁷

Could the President act independently under his interpretation of inherent or implied power, even to the extent of acting contrary to congressional policy as expressed in statute? The Court blocked that inquiry: “It is unnecessary for present purposes to determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation.”²⁷⁸

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 tribunal.²⁷⁹ Although the Court declined to address Haupt’s status as a U.S. citizen, it made it clear that U.S.

²⁷² Letter from Stone to Frankfurter, September 10, 1942, Felix Frankfurter Papers, Library of Congress.

²⁷³ *Ex parte Quirin*, 317 U.S. at 46-47.

²⁷⁴ “Memorandum of Mr. Justice Frankfurter, *In re Saboteur Cases*,” Papers of William O. Douglas, Box 77, Library of Congress (emphasis in original).

²⁷⁵ *Ex parte Quirin*, 317 U.S. at 20.

²⁷⁶ *Id.* at 25.

²⁷⁷ *Id.* at 28.

²⁷⁸ *Id.* at 29.

²⁷⁹ *Id.* at 30-31.

citizenship of an enemy belligerent “does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war.”²⁸⁰

As for *Ex parte Milligan*, the Court drew a distinction between the facts of that case and the Nazi saboteurs. Milligan was a U.S. citizen who had resided in Indiana for 20 years; he did not reside in any of the rebellious states and was not an enemy combatant entitled to POW status or subject to the penalties imposed on unlawful belligerents.²⁸¹ He was a “non-belligerent, not subject to the law of war.”²⁸²

Did Roosevelt’s proclamation and military order conflict with Articles 38, 43, 46, 50½, and 70? The Court held that the secrecy surrounding the trial and proceedings before the tribunal “will preclude a later opportunity to test the lawfulness of the detention.”²⁸³ Secrecy denied the Justices essential information, but over time the record of the tribunal would become available and cast doubt on the Court’s decision.

The Court was unanimous in deciding that the Articles in question “could not at any stage of the proceedings afford any basis for issuing the writ.”²⁸⁴ Although of one mind on that point, the Justices divided on the legal reasoning: “a majority of the full Court are not agreed on the appropriate grounds for decision.” Some Justices believed that Congress did not intend the Articles of War to govern a presidential military tribunal convened to try enemy invaders. Others concluded that the military tribunal was governed by the Articles of War, but that the Articles in question did not foreclose the options selected by President Roosevelt.²⁸⁵

Evaluating the Decision

The popular press generally gave great credit to the Court for hearing and deciding the case. An editorial in the *Washington Post* said that “Americans can have the satisfaction of knowing that even in a time of great national peril we did not stoop to the practices of our enemies.”²⁸⁶ The *New York Times* predicted that the full opinion, “which will be made public later on, will go into our constitutional history besides the Milligan decision, delivered in 1866.”²⁸⁷ The *Times* added: “We had to try them because a fair trial for any person accused of crime, however apparent his

²⁸⁰ Id. at 37.

²⁸¹ Id. at 45.

²⁸² Id.

²⁸³ Id. at 47.

²⁸⁴ Id.

²⁸⁵ Id.

²⁸⁶ “Justice Is Done,” *Washington Post*, Aug. 9, 1942, at 6.

²⁸⁷ “Motions Denied,” *New York Times*, Aug. 1, 1942, at 10.

guilt, is one of the things we defend in this war.”²⁸⁸ Much of the scholarly comment appeared after the per curiam but before the full opinion.²⁸⁹

The most penetrating analysis of *Quirin* was prepared by Frederick Bernays Wiener, Frankfurter’s former student at Harvard Law School but by 1942 a national expert on military law. Wiener’s three analyses, sent to Frankfurter on November 5, 1942 and January 13 and August 1 of 1943, found serious deficiencies with the decision. The first letter credits the Court for taking “the narrowest — and soundest — ground” by holding that the German saboteurs were “war criminals (or unlawful belligerents) as that term is understood in international law” and that, “under established American precedents dating back through the Revolution, violators of the laws of war are not entitled, as a matter of constitutional right, to a jury trial.”²⁹⁰ Wiener complimented the Court for confronting some of the “extravagant dicta” in the majority’s opinion in *Milligan*, and agreed with the Court that Haupt’s citizenship was irrelevant in deciding the tribunal’s jurisdiction to try him.²⁹¹

At the same time, Wiener criticized the Court for creating “a good deal of confusion as to the proper scope of the Articles of War insofar as they relate to military commissions.” Weaknesses in the decisions flowed “in large measure” from the administration’s disregard for “almost every precedent in the books” when it established the military tribunal.²⁹² He “parted company” with the Court’s “careless or uninformed handling” of the Articles of War. During the Civil War, he said, tribunals had repeatedly and improperly assumed jurisdiction over offenses better handled by courts-martial.²⁹³

To Wiener, it seemed “too plain for argument” that Article 46 required “legal review of a record of trial by military commission before action thereon by the reviewing authority; that the President’s power to prescribe rules of procedure did not permit him to waive or override this requirement; that he did in fact do so; and that he disabled his principal legal advisers [the Judge Advocate General] by assigning to them the task of prosecution.”²⁹⁴ Wiener denied that Roosevelt’s actions could be justified under his powers as Commander in Chief or by invoking implied or inherent executive authority: “I do not think any form of language, or any talk about the President’s inherent powers as Commander in Chief, is sufficient to justify that portion of the precept, which, in my considered judgment, was palpably illegal.”²⁹⁵

²⁸⁸ “They That Take the Sword,” *New York Times*, Aug. 9, 1942, at 10.

²⁸⁹ See CRS Report RL31340, *Military Tribunals: The Quirin Precedent*, by Louis Fisher, at 39-41.

²⁹⁰ “Observations of Ex parte Quirin,” at 1, signed “F.B.W.” Frankfurter Papers.

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ *Id.* at 4.

²⁹⁴ *Id.* at 8.

²⁹⁵ *Id.*

Writing in 1947, constitutional scholar Edward S. Corwin viewed *Quirin* as “little more than a ceremonious detour to a predetermined end.”²⁹⁶ Alpheus Thomas Mason, in his book on Chief Justice Stone and in a law review article, explained Stone’s dilemma in drafting an opinion that would do the least damage to the judiciary. The Court could do little other than uphold the jurisdiction of the tribunal, being “somewhat in the position of a private on sentry duty accosting a commanding general without his pass.”²⁹⁷ Stone was well aware that the judiciary was “in danger of becoming part of an executive juggernaut.”²⁹⁸

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.”²⁹⁹ In an interview on June 9, 1962, Justice Douglas expressed his misgivings with the process: “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.”³⁰⁰

To Michal Belknap, Chief Justice Stone went to “such great lengths to justify Roosevelt’s proclamation” that he preserved the “form” of judicial review while “gutt[ing] it of substance.”³⁰¹ David J. Danelski regarded the full opinion in *Quirin* as “a rush to judgment, an agonizing effort to justify a *fait accompli*.”³⁰² The opinion signaled a victory for the executive branch but, for the Court, “an institutional defeat.”³⁰³ 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.”³⁰⁴

²⁹⁶ Edward S. Corwin, *Total War and the Constitution* 118 (1947).

²⁹⁷ Alpheus Thomas Mason, “Inter Arma Silent Leges: Chief Justice Stone’s Views,” 69 *Harv. L. Rev.* 806, 830 (1956).

²⁹⁸ *Id.* at 831. These views would also appear in Mason’s book, *Harlan Fiske Stone: Pillar of the Law* 665-66 (1956).

²⁹⁹ “Memorandum Re: Rosenberg v. United States, Nos. 111 and 687, October Term 1952,” June 4, 1953, at 8; Frankfurter Papers, Harvard Law School, Part I, Reel 70, Library of Congress.

³⁰⁰ Conversation between Justice William O. Douglas and Professor Walter F. Murphy, June 9, 1962, at 204-05; Seeley G. Mudd Manuscript Library, Princeton University.

³⁰¹ Michal R. Belknap, “The Supreme Court Goes to War: The Meaning and Implications of the Nazi Saboteur Case,” 89 *Mil. L. Rev.* 59, 83 (1980).

³⁰² David J. Danelski, “The Saboteurs’ Case,” 1 *J. Sup. Ct. Hist.* 1966, at 61.

³⁰³ *Id.* at 80.

³⁰⁴ *Id.*

Another Submarine in 1944

In 1944, Nazi Germany brought other saboteurs to the United States by submarine, this time landing two on the coast of Maine. Like the earlier eight, the two men had a falling out and were picked up by the FBI in New York City, William Colepaugh on December 26 and Erich Gimpel four days later. Initially, it appeared that they would be tried in the same manner as in 1942: by a military tribunal sitting on the fifth floor of the Justice Department, and with Biddle and Cramer leading the prosecution.³⁰⁵

Secretary of War Stimson, who had objected in 1942 to Biddle and Cramer acting as prosecutors, this time intervened forcefully to block their participation. In his diary, Stimson expressed contempt for Biddle's need for the spotlight: "It is a petty thing. That little man is such a small 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."³⁰⁶

Stimson was successful in persuading Roosevelt to shift the burden to professionals in the military. On January 12, 1945, Roosevelt issued a military order that empowered the commanding generals, under the supervision of the Secretary of War, to appoint military tribunals for the trial of Colepaugh and Gimpel. Unlike 1942, the trial record would not go directly to the President. 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 50½ of the Articles of War."³⁰⁷

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 lawyers from the Justice Department assisted with the prosecution.³⁰⁸ 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, D.C. but at Governors Island, New York City.³⁰⁹

On February 14, 1945, the tribunal sentenced Colepaugh and Gimpel to death by hanging. The verdicts and sentencing went to General Terry, as the appointing office, and from there to the Judge Advocate General's office.³¹⁰ President Roosevelt died on April 12, before the executions could be carried out. On May 8, President

³⁰⁵ Fisher, *Nazi Saboteurs on Trial*, at 138-44. Gimpel wrote a book on his experience. First published in Great Britain under the title *Spy for Germany*, it was published in the United States in 2003 and retitled *Agent 146: The True Story of Nazi Spy in America*.

³⁰⁶ Diary of Henry L. Stimson, Jan. 5, 1945, Roll 7, at 18-19, Library of Congress.

³⁰⁷ 10 Fed. Reg. 548 (1945).

³⁰⁸ "2 Spy Suspects Given to Army for Trial," *New York Times*, Jan. 19, 1945, at 14.

³⁰⁹ "Spy Trials Open Today," *New York Times*, Feb. 6, 1945, at 5.

³¹⁰ "2 Spies Sentenced to Die by Hanging," *New York Times*, Feb. 15, 1945, at 1.

Harry Truman announced the end of the war in Europe, and the following month he commuted the death sentences to life imprisonment.³¹¹ In 1955, the U.S. government released Gimpel and deported him to Germany.³¹² Colepaugh, without success, initiated a habeas corpus action from prison, arguing that he should not have been tried by a military tribunal.³¹³ He was paroled in 1960.³¹⁴

Other World War II Tribunals

Other military tribunals were used during and shortly after World War II. With martial law in Hawaii, traditional constitutional privileges, including the writ of habeas corpus and the right to be tried in civil court, were set aside. Tribunals were used to try and convict enemy war criminals, raising principles of command responsibility that would later be altered when judging American commanders in Vietnam.

Martial Law in Hawaii

After the December 7, 1941 attack on Pearl Harbor by Japan, Governor Joseph B. Poindexter issued a proclamation transferring all governmental functions (including judicial) to the Commanding General of the Hawaiian Department. He called upon the Commanding General to prevent an invasion and to suspend the privilege of the writ of habeas corpus.³¹⁵ On that same day, the Commanding General assumed the role of “Military Governor” and created two forms of military tribunal to try any case involving an offense against federal law, Hawaiian law, “or the rules, regulations, orders or policies of the military authorities.” These military courts included provost courts, which were authorized to impose fines up to \$5,000 and imprisonment for up to five years, and a military tribunal empowered to decide more severe sentences, including the death penalty.³¹⁶ The Commanding General cabled President Roosevelt about the declaration of martial law and the suspension of the writ of habeas corpus and received Roosevelt’s approval.³¹⁷

Several challenges to martial law and the suspension of habeas corpus reached the federal courts. One involved a petition for a writ filed on February 19, 1942, by Clara Zimmerman, who claimed that her husband, Hans, had been unlawfully

³¹¹ “Truman Commutes to Life Terms Death Sentences of Two Spies,” *New York Times*, June 24, 1945, at 1.

³¹² “44 Nazi Spy Landed in U-boat is Deported to West Germany,” *New York Times*, Aug. 13, 1955, at 15.

³¹³ *Colepaugh v. Looney*, 235 F.2d 429 (10th Cir. 1956), cert. denied, 352 U.S. 1014 (1957).

³¹⁴ Richard Willing, “An American Was the Nazi Spy Next Door,” *USA Today*, Feb. 28, 2002, at 2A.

³¹⁵ Garner Anthony, “Martial Law in Hawaii,” 30 Cal. L. Rev. 371, 371-72, 392-93 (1942).

³¹⁶ *Id.* at 393-94.

³¹⁷ Garner Anthony, “Martial Law, Military Government and the Writ of Habeas Corpus in Hawaii,” 31 Cal. L. Rev. 477, 478 (1943).

detained and imprisoned by military authorities. Both were U.S. citizens. District Judge Delbert E. Metzger denied the writ on the ground that military orders had forbade its issuance: “I feel that the court is under duress by reason of the order and not free to carry on the functions of the court in a manner in which the court conceives to be its duty.”³¹⁸

On December 14, 1942, the Ninth Circuit affirmed the denial of the petition, holding that the Governor of Hawaii was authorized to suspend until further notice the privilege of the writ of habeas corpus. The court relied on Section 67 of the Hawaiian Organic Act.³¹⁹ Although no charges had been filed against Zimmerman, the military kept him in prison. The Ninth Circuit said that civil courts, “in circumstances like the present, ought to be careful to avoid idle or captious interference.”³²⁰ Civil courts “are ill adapted to cope with an emergency of this kind. As a rule they proceed only upon formal charges.” Under this reasoning, so long as the government pressed no charges, it could hold Zimmerman indefinitely, or at least to the end of martial law.

In a dissent to the Ninth Circuit ruling, Judge Bert Emory Haney said that military government “is not expressly recognized in the Constitution and is wholly and entirely contrary to the form of government provided for therein.”³²¹ Government by a commanding officer, he noted, “is of course not government by executive, legislative and judicial branches, the kind of government provided for in the Constitution.”³²² To the extent that a military government could exist by reason of “necessity,” the question of whether a particular military action was necessary represented a “question of fact” that courts were competent to judge, “depending on the existence of facts in the territory.”³²³ Later, the Supreme Court denied review on the ground that the case was moot, “it appearing that Hans Zimmerman . . . has been released from the respondent’s custody.”³²⁴

In August 1942, Ingram M. Stainback replaced Poindexter as Governor. The United States had carried off the very successful Battle of Midway in June 1942, inflicting such heavy damage on the Japanese fleet that it was commonly understood that the danger of a land invasion of Hawaii no longer existed. Stainback was intent

³¹⁸ Anthony, “Martial Law, Military Government and the Writ of Habeas Corpus in Hawaii,” 32 Cal. L. Rev. at 485.

³¹⁹ *Ex parte Zimmerman*, 132 F.2d 442, 444 (9th cir. 1942). The Organic Act, passed by Congress in 1900, provided in Section 67 that in case of rebellion or invasion, “or imminent danger thereof, when the public safety requires it,” the Governor may “suspend the privilege of the writ of habeas corpus, or place the Territory, or any part thereof, under martial law, until communication can be had with the President and his decision thereon made known.” 31 Stat. 153, Sec. 67 (1900).

³²⁰ *Ex parte Zimmerman*, 132 F.2d at 446.

³²¹ *Id.* at 449.

³²² *Id.*

³²³ *Id.* at 450.

³²⁴ *Zimmerman v. Walker*, 319 U.S. 744 (1943).

on shifting political power from martial law to civilian authority.³²⁵ Shortly after his inauguration, military authorities issued a general order on August 31, returning to the Hawaiian courts “criminal prosecutions and civil litigation to the extent that war conditions permit.” The privilege of habeas corpus remained suspended, however, and martial law still prevailed. The general order specified the type of criminal proceeding and civil suit that would remain within the jurisdiction of the military.³²⁶ A compromise worked out between the Interior and Justice Departments shifted a number of functions to the civil government.³²⁷

Proclamations on February 8, 1943, signed by both the Governor and the Commanding General, restored much of civil authority to Hawaii. With regard to violations of territorial law and federal law, trial by jury and indictment by grand jury in the civil courts replaced the provost courts and military tribunals. Nevertheless, Stainback’s proclamation included language that “a state of martial law remains in effect and the privilege of the writ of habeas corpus remains suspended.”³²⁸ Judicial proceedings were restored, both criminal and civil, except (1) criminal prosecutions against members of the armed forces, (2) civil suits against members of the armed forces, and (3) criminal prosecutions for violations of military orders. The Commanding General could waive the last exception for a particular prosecution or suit.³²⁹

Judge Metzger confronted the military’s detention of two men, Walter Glockner and Erwin R. Seifer. Both were Americans of German descent and had been held for the military for some time. When petitions for writs of habeas corpus were filed on their behalf, the U.S. attorney argued that the petitions should be dismissed. Metzger denied the government’s motion partly on the ground that the proclamation issued by Stainback on February 8, 1943 had restored both civil government and the writ.³³⁰ In July 1943, Metzger issued a writ of habeas corpus to have the two men produced in court. When the military refused, he fined the Commanding General, Robert C. Richardson, Jr., \$5,000 for contempt. The contempt citation found Richardson in “open and notorious defiance of the mandate of the court.”³³¹ The face-off recalls the confrontation between Judge Hall and Andrew Jackson.

Richardson upped the ante by issuing an order that prohibited habeas corpus proceedings, directed Metzger to purge the court’s records of the contempt citation, and threatened to punish him either through the provost courts or the military

³²⁵ J. Garner Anthony, *Hawaii Under Army Rule 22* (1955).

³²⁶ *Id.* at 159-60.

³²⁷ *Id.* at 22-23; Fred L. Israel, “Military Justice in Hawaii, 1941-44,” 36 *Pac. Hist. Rev.* 243 (1967).

³²⁸ Anthony, “Martial Law, Military Government and the Writ of Habeas Corpus in Hawaii,” 31 *Cal. Rev. Rev.* at 482, 508-11.

³²⁹ *Id.* at 509 (section (i)) and 510 (section (j)).

³³⁰ Walter P. Armstrong, “Martial Law in Hawaii,” 29 *Am. Bar Ass’n J.* 698, 698 (1943).

³³¹ Anthony, “Martial Law, Military Government and the Writ of Habeas Corpus in Hawaii,” 31 *Cal. L. Rev.* at 488.

tribunal.³³² As the dispute escalated, Richardson set Glockner and Seifer free on the condition that they leave Hawaii.³³³ The Justice Department rushed in and convinced Richardson to rescind his order, which was done, 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.³³⁴

Metzger wrote about paying a price for asserting an independent voice. As a territorial judge, he was appointed to the Hawaiian trial court in 1934 for a term of four years and was reappointed in 1938. The following year he received a six-year appointment to the U.S. district court. In 1945 he was reappointed but failed of reappointment at the end of the Truman Administration.³³⁵

Other cases of civilians tried by military courts followed. Harry E. White, a U.S. citizen, was arrested by the military and brought before the provost court on a charge of embezzlement. His trial began and ended on the afternoon of August 25, 1942, leading to a guilty judgment and a sentence of five years in prison. Although no appeal from a provost court judgment was allowed, the sentence was later reduced to four years.³³⁶

White's trial took place after the Battle of Midway, which removed the threat of a land invasion of Hawaii. Several judges of the Hawaiian territorial courts stipulated that their courts were open and fully capable of taking and deciding cases.³³⁷ Midway helped strengthen the effort to restore civil authority.

U.S. District Judge J. Frank McLaughlin ruled that even if a valid state of martial law existed in Hawaii in August 1942, White had been deprived of his constitutional rights under the Fifth and Sixth Amendments. In holding that the provost court lacked jurisdiction either over White or the subject matter of his case, McLaughlin relied on both *Milligan* and *Quirin* to insist that courts in time of war or peace have an obligation to preserve the safeguards of civil liberty.³³⁸ He also denied that Poindexter had any authority on December 7, 1941 to transfer or delegate the judicial power to the military.³³⁹ Building on those positions, McLaughlin granted the writ and discharged White.

³³² Id. at 511-14.

³³³ Id. at 490.

³³⁴ Claude McColloch, "Now It Can Be Told: Judge Metzger and the Military," 35 Am. Bar. Ass'n J. 365 (1949).

³³⁵ Delbert Metzger, "No Longer a Judge: An Ex-Jurist Tells Why," *The Nation*, July 18, 1953, at 52.

³³⁶ The specifics of the provost court action are described in *Ex parte White*, 66 F.Supp. 982, 984 (D. Hawaii 1944).

³³⁷ Id. at 985.

³³⁸ Id. at 986-87.

³³⁹ Id. at 987.

Judge McLaughlin also handled the case of Fred Spurlock, a black American brought before a provost court and charged with assaulting a civilian policeman. The court found him guilty and sentenced him to five years in prison. After he pleaded for leniency, the court placed him on probation. When he got in trouble again, the provost court sentenced him to five years at hard labor. That time was later reduced by the Military Governor to two and a half years. Even though Spurlock's problems preceded the Battle of Midway, McLaughlin ruled that the provost court lacked jurisdiction either over Spurlock or the charge brought against him, and that the conviction was thus null and void.³⁴⁰

Although Spurlock's conduct preceded Midway, McLaughlin did not issue his decision until June 23, 1944. In a brief per curiam, the Ninth Circuit reversed him, basing its decision on the Duncan case, discussed next.³⁴¹ After other Hawaiian martial law cases had been accepted by the Supreme Court, General Richardson intervened to grant Spurlock a pardon.³⁴²

Lloyd Duncan, a civilian shipfitter employed at the Navy Yard at Honolulu, 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 Stainback had issued his proclamation of February 8, 1943, restoring some powers and functions to civilian agencies, including civil and criminal courts.³⁴³ Metzger decided that martial law could not override civilian institutions unless Congress passed specific authorizing legislation.³⁴⁴ He also held that the Organic Act gave Governor Poindexter no power to transfer or abdicate his authority to military officials,³⁴⁵ and that martial law did not lawfully exist in Hawaii in 1943, particularly after March 10, 1943 (the effective date of Stainback's proclamation).³⁴⁶

On November 1, 1944, the Ninth Circuit reversed this decision and also the ruling by Judge McLaughlin in Harry White's case.³⁴⁷ It held that the proclamation of February 8, 1943, did not have the effect of terminating the suspension of the privilege of the writ of habeas corpus. Moreover, to the extent that military orders had restored some power to local courts, it would be "a perversion of the truth to say that the courts were 'open' during this period — certainly they did not function as a coordinate or independent branch of the government. So far as they were permitted to operate they did so 'as agents of the Military Governor.'"³⁴⁸ On February 12, 1945,

³⁴⁰ Ex parte Spurlock, 66 F.Supp. 997, 1003 (D. Haw. 1944).

³⁴¹ Steer v. Spurlock, 146 F.2d 652 (9th Cir. 1944).

³⁴² 92 Cong. Rec. A4673 (1946).

³⁴³ Ex parte Duncan, 66 F.Supp. 976, 979 (D. Haw. 1944).

³⁴⁴ Id. at 980.

³⁴⁵ Id. at 981.

³⁴⁶ Id.

³⁴⁷ Ex parte Duncan, 146 F.2d 576 (9th cir. 1944).

³⁴⁸ Id. at 579.

the Supreme Court granted cert to hear the *Duncan* and *White* cases.³⁴⁹ It did not issue a decision until a year later, after the war was over. Thus, the wartime legal scrutiny of martial law in Hawaii functioned entirely at the level of district courts and the Ninth Circuit.

In 1946, the Supreme Court held that Section 67 of the Organic Act authorized the Governor of Hawaii, with the approval of the President, to “invoke military aid under certain circumstances,” but Congress “did not specifically state to what extent the army could be used or what power it could exercise. It certainly did not explicitly declare that the Governor in conjunction with the military could for days, months or years close all the courts and supplant them with military tribunals.”³⁵⁰ The term martial law in Section 67 “carries no precise meaning.”³⁵¹ The Court rejected the argument of the Justice Department that the legislative history of Section 67 revealed congressional intent “to give the armed forces extraordinarily broad powers to try civilians before military tribunals.”³⁵² Military trials of civilians charged with crimes, “especially when not made subject to judicial review, are so obviously contrary to our political traditions and our institution of jury trials in courts of law, that the tenuous circumstances offered by the Government can hardly suffice to persuade us that Congress was willing to enact a Hawaiian supreme court decision [from 1895] permitting such a radical departure from our steadfast beliefs.”³⁵³

In reviewing the development of government institutions in America, the Court pressed home the fundamental principle that courts “and their procedural safeguards are indispensable to our system of government,” and that the framers “were opposed to governments that placed in the hands of one man the power to make, interpret and enforce the laws.”³⁵⁴

Trials of Three Japanese Leaders

The Supreme Court also reviewed the use of military tribunals to judge the wartime conduct of two Japanese generals — Tomoyuki Yamashita and Masaharu Homma — and Foreign Minister Koki Hirota. Judicial review of military trials during World War II rarely touched the operations of allied military tribunals created in the Far East, leading to the execution of 920 Japanese and to prison terms for some 3,000. An International Military Tribunal in Toyko, sitting from 1946 to 1948, tried and sentenced 25 prominent Japanese war criminals, including Prime Minister Hideki Tojo.³⁵⁵

³⁴⁹ *Duncan v. Kahanamoku*; *White v. Steer*, 324 U.S. 833 (1945).

³⁵⁰ *Duncan v. Kahanamoku*, 327 U.S. 304, 315 (1946).

³⁵¹ *Id.*

³⁵² *Id.* at 316.

³⁵³ *Id.* at 317.

³⁵⁴ *Id.* at 322.

³⁵⁵ Philip R. Piccigallo, *The Japanese on Trial: Allied War Crimes Operations in the East, 1945-1951* xi (1979).

Yamashita and Homma were charged with permitting atrocities against civilians and prisoners of war. The question before the tribunal was whether they were responsible for the crimes. The Nazi saboteur cases of 1942 and 1945 recognized that theater commanders could set up military tribunals and try those who violate the law of war. As commander of the Far Eastern theater, General Douglas MacArthur directed Lt. Gen. Wilhelm D. Styer to establish the tribunal for Yamashita, and it was Styer who appointed the prosecutors, defense counsel, and members of the tribunal.³⁵⁶ MacArthur retained control over the charges to be leveled against the accused and the rules that would govern tribunal procedures.³⁵⁷

Yamashita was charged as a war criminal on September 25, 1945. Prosecutors accused him, as commanding general of the Japanese 14th Army Group in the Philippines, of failing to prevent his troops from committing atrocities against the civilian population and prisoners of war. Homma faced similar charges. They would be prosecuted not for what they did but for what they failed to do, not for what they knew but what they should have known. MacArthur's aides, tasked with drafting plans for a military tribunal, realized that there was no precedent for charging a field commander "with the negligence of duty in controlling his troops."³⁵⁸ None of the charges established a direct link between Yamashita and the underlying criminal acts.³⁵⁹

General Styer appointed six U.S. army officers to defend Yamashita. They had only three weeks to prepare for trial, locate witnesses, and conduct research on 123 charges.³⁶⁰ Five American generals sat on the tribunal, none of them lawyers.³⁶¹ One of the generals was designated a "law member" but he was not a lawyer.³⁶² Only one of the generals had extensive combat command experience.³⁶³

When the trial began on October 29, 1945, a defense counsel for Yamashita argued that the charges set forth "no instance of neglect of duty" by him, no acts of commission or omission that "permitted" the crimes, and that American jurisprudence did not hold a commanding officer responsible for the criminal acts of subordinates.³⁶⁴ The prosecution responded that the crimes were so flagrant that "they must have been known" to Yamashita, and that if he did not know "it was

³⁵⁶ Richard L. Lael, *The Yamashita Precedent: War Crimes and Command Responsibility*, 71, 73 (1982).

³⁵⁷ *Id.* at 73.

³⁵⁸ *Id.* at 69.

³⁵⁹ *Id.* at 80.

³⁶⁰ *Id.* at 81.

³⁶¹ J. Gordon Feldhaus, "The Trial of Yamashita," 15 S. Dak. B. J. 181, 185 (1946).

³⁶² George F. Guy, "The Defense of Yamashita," 4 Wyo. L. J. 153, 161 (1950).

³⁶³ Stephen B. Ives, Jr., "Vengeance Did Not Deliver Justice," *Washington Post*, Dec. 30, 2001, at B2; Lael, *The Yamashita Precedent*, at 88.

³⁶⁴ Lael, *The Yamashita Precedent*, at 82.

simply because he took affirmative action not to know.”³⁶⁵ Two prosecution witnesses attempted to link Yamashita to the atrocities, but the first depended on hearsay and the second’s testimony was rebutted by a defense witness. Both prosecutions witnesses had much to gain personally and financially by cooperating with U.S. officials.³⁶⁶

On December 7, 1945, the tribunal found Yamashita guilty as charged and sentenced him to death by hanging. Twelve international correspondents covering the trial voted 12 to zero that Yamashita should have been acquitted.³⁶⁷ His counsel filed an unsuccessful appeal to the Philippine Supreme Court, which ruled that it lacked jurisdiction over the U.S. army. Defense counsel telegraphed a request to the U.S. Supreme Court for a stay of execution, which was granted.³⁶⁸

The Supreme Court divided 6-2 in upholding the tribunal’s actions. Writing for the majority was the author of *Quirin*, Chief Justice Harlan Fiske Stone. He emphasized that the Court was “not here concerned with the power of military commissions to try civilians,” citing *Milligan* for authority.³⁶⁹ Nor did the Court attempt to appraise or weigh the evidence introduced at trial, concluding that such matters were wholly within the competence of the tribunal.³⁷⁰

The first point raised by the defense was that the cessation of hostilities denied MacArthur the authority to create the tribunal. Stone ruled that the executive branch could try individuals who committed violations of the law of war before the cessation, “at least until peace has been officially recognized by treaty or proclamation of the political branch of the Government.”³⁷¹ In response to the claim by the defense that the tribunal failed to charge Yamashita with a violation of the law of war, Stone found that the charges constituted violations of the law of war, and that Yamashita’s failure to control his troops deserved inclusion in the law of war. Several provisions of the Fourth Hague Convention of 1907, the Tenth Hague Convention, and the Geneva Red Cross Convention required that troops be “commanded by a person responsible for his subordinates.”³⁷² Language of that breadth, however, does not necessarily mean that a commander is liable for criminal action by subordinates.

A third point raised by the defense was that the procedures followed by the tribunal, including the admission of hearsay as evidence, deprived Yamashita of a fair

³⁶⁵ *Id.* at 83.

³⁶⁶ *Id.* at 84-85.

³⁶⁷ Piccigallo, *The Japanese on Trial*, at 57.

³⁶⁸ *Id.* at 173.

³⁶⁹ *In re Yamashita*, 327 U.S. 1, 9 (1946).

³⁷⁰ *Id.* at 17.

³⁷¹ *Id.* at 12.

³⁷² *Id.* at 15-16. The quoted language comes from Article 1 of the Fourth Hague Convention; 36 Stat. 2295 (1907).

trial. Article of War 38 provided that the President could prescribe the procedures for courts-martial, courts of inquiry, military commissions, and other military tribunals and shall apply the rules of evidence “generally recognized in the trial of criminal cases in the district courts of the United States.” Hearsay is not admissible in federal courts. Yet Stone concluded that Article 38 was not “applicable to the trial of an enemy combatant by a military commission for violations of the law of war.”³⁷³ He pointed to other Articles to show that the procedural safeguards were meant to apply to U.S. soldiers and personnel that accompany the U.S. military, not to enemy combatants.³⁷⁴ By admitting hearsay and other procedures that would not be allowed in federal court, Stone said the tribunal did not violate “any act of Congress, treaty or military command defining the commission’s authority.”³⁷⁵

A fourth point raised by the defense was that the tribunal failed to give advance notice of the trial to a neutral power representing the interests of Japan, as required by Article 60 of the Geneva Convention. Stone concluded that the requirement for notice applies only to persons subjected to judicial proceedings for offenses committed while prisoners of war.³⁷⁶ It was his judgment that Yamashita’s trial did not violate the requirement for notice.

Justices Frank Murphy and Wiley Rutledge issued lengthy dissents. Murphy charged that Yamashita’s rights under the Due Process Clause of the Fifth Amendment had been “grossly and openly violated without any justification.”³⁷⁷ The Due Process Clause, Murphy pointed out, applies to “any person” who is accused of a federal crime. No exception “is made as to those who are accused of war crimes or as to those who possess the status of an enemy belligerent.”³⁷⁸ Murphy said that Yamashita 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.”³⁷⁹

Rutledge concluded that the proceedings and rules of evidence of the Yamashita tribunal violated two Articles of War (25 and 38), both of which, he said, applied to all military commissions and tribunals.³⁸⁰ Article 25 described the process of taking depositions, and specified that they may be read in evidence before any military court or tribunal “in any case not capital.” Article 38 required the President to prescribe procedures for military courts, with the requirement that the procedures (“insofar as he shall deem practicable”) shall apply the rules of evidence generally recognized in

³⁷³ Id. at 19.

³⁷⁴ Id.

³⁷⁵ Id. at 23.

³⁷⁶ Id. at 24.

³⁷⁷ Id. at 40.

³⁷⁸ Id. at 21.

³⁷⁹ Id. at 27-28.

³⁸⁰ Id. at 61.

the trial of criminal cases in federal court. Article 38 closed with this admonition: “nothing contrary to or inconsistent with these articles shall be so prescribed.”

It was not in the American tradition, Rutledge said, “to be charged with crime which is defined after his conduct, alleged to be criminal, has taken place; or in language not sufficient to inform him of the nature of the offense or to enable him to make defense.”³⁸¹ He distinguished what the Court did in *Quirin*, in the middle of war, with the conditions surrounding Yamashita’s trial, after hostilities had ceased.³⁸² A separate section of Rutledge’s dissent concluded that Yamashita’s trial was in conflict with the Geneva Convention of 1929.³⁸³ In a private letter, Rutledge said that the Yamashita case “will outrank Dred Scott in the annals of the Court.”³⁸⁴

Following the Court’s decision, defense counsel appealed to President Truman for clemency. He declined to act, leaving the matter in the hands of the military.³⁸⁵ MacArthur confirmed the sentence and on February 23, 1946, in a prison camp 30 miles south of Manila, Yamashita was hanged. A. Frank Reel, a member of the defense team, concluded 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*.”³⁸⁶

The military tribunal for General Homma began in Manila on January 3, 1946. Charges against him included the bombing of Manila after it was declared an open city, the Bataan Death March of 1942, and POW camp abuses, all of the events occurring during Homma’s term as commander-in-chief in the Philippines from December 8, 1941 to August 15, 1942.³⁸⁷ Similar to the Yamashita trial, prosecutors charged that Homma “knew or should have known” of the commission of the atrocities.³⁸⁸ The tribunal found Homma guilty on February 11, 1946 for failing to control the operations of his troops and sentenced him to be hanged. On the same day, the Supreme Court divided 6-2 in denying the motion for a writ of habeas corpus to review the tribunal’s action. Justices Murphy and Rutledge were again the dissenters.³⁸⁹ MacArthur ordered that Homma be shot rather than hanged.³⁹⁰

Koki Hirota was among 28 defendants tried for war crimes before the International Military Tribunal for the Far East. He served as Prime Minister from March 9, 1936 to February 2, 1937, and later as Foreign Minister until he retired in

³⁸¹ *Id.* at 43.

³⁸² *Id.* at 46.

³⁸³ *Id.* at 72-78.

³⁸⁴ John P. Frank, *The Marble Palace: The Supreme Court in American Life* 137 (1972).

³⁸⁵ Guy, “The Defense of Yamashita,” 14 *Wyo. L. J.* at 178.

³⁸⁶ A. Frank Reel, *The Case of General Yamashita* 245 (1949) (emphasis in original).

³⁸⁷ Piccigallo, *The Japanese on Trial*, at 63.

³⁸⁸ *Id.* at 64.

³⁸⁹ *Homma v. Patterson*, 327 U.S. 759 (1946).

³⁹⁰ Lawrence Taylor, *A Trial of Generals: Homma, Yamashita, MacArthur* 218-19 (1981).

1938. During this last assignment Japanese forces marched into China and committed the atrocities now known as the Rape of Nanking. During a six-week period, Japanese troops slaughtered more than a quarter million Chinese.³⁹¹ While Hirota was not in charge of the military forces, the issue was whether he knew of the massacres.³⁹²

In 1948, The Supreme Court reviewed the actions of the International Military Tribunal for the Far East. Although the tribunal had been created by MacArthur, a 6-1 majority ruled that it acted as the agent of the Allied Powers rather than of the United States, and that it was therefore not a tribunal of the United States. At the same time, the Court acknowledged that MacArthur “has been selected and is acting as the Supreme Commander for the Allied Powers,” and that he had set up the tribunal as the agent of the Allied Powers.³⁹³ The Justices 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. 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.”³⁹⁴ Justice Murphy dissented, but without publishing his views. Justice Rutledge reserved making a decision, allowing him to announce his vote at a later time. Before he could do that he died on September 10, 1949. Justice Robert Jackson took no part in the decision. Hirota was executed on December 23, 1948.

Command Responsibility

Military actions by U.S. forces in Vietnam raised the question whether American generals and commanders could be held responsible under the same test that had been applied to Yamashita, Homma, and Hirota. Within a few years of those trials, however, American judges moved away from the standard that a commander “should have known” or “must have known.” The test now shifted to whether a commander knew of atrocities or showed a wanton disregard of what his subordinates were doing. In the High Command Case in Nuremberg, in October 1948, a U.S. military tribunal noted that a “high commander cannot keep completely informed of the details of military operations of subordinates and most assuredly not of every administrative measure. . . . Criminality does not attach to every individual in the chain of command from that fact alone. There must be a personal dereliction. That can occur only where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part.” For

³⁹¹ Iris Chang, *The Rape of Nanking* (1997).

³⁹² John Toland, *The Rising Sun* 34-35, 42, 48-50 (2003 ed.); Chang, *The Rape of Nanking*, at 103-04, 148, 174-75; Arnold C. Brackman, *The Other Nuremberg: The Untold Story of the Toyko War Crimes Trials* 180-81, 274, 328-29, 380 (1987); Piccigallo, *The Japanese on Trial*, at 30.

³⁹³ *Hirota v. MacArthur*, 338 U.S. 197, 198 (1948).

³⁹⁴ *Id.* at 201-02.

the latter, “it must be a personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence.”³⁹⁵

The court-martial of Captain Ernest L. Medina in 1971 charged him with responsibility for acts of force and violence while interrogating prisoners of war in Vietnam and a failure to exercise control over subordinates who killed noncombatants. The instructions that the military judge issued to the court members differed markedly from the principle of command responsibility applied to Yamashita. The judge stated that a commander is responsible “if he has *actual* knowledge that troops or other persons subject to his control are in the process of committing or are about to commit a war crime and he wrongfully fails to take the necessary and reasonable steps to insure compliance with the law of war.” Mere presence at the scene “without knowledge” would not suffice. To be found guilty, it would be essential that a commander “know that his subordinates are in the process of committing atrocities or are about to commit atrocities.”³⁹⁶

Studies during the Vietnam period rejected the principle of command responsibility under which Yamashita, Homma, and Hirota were tried. Instead of asserting that a commander “must have known” or “should have known,” there had to be a showing of actual knowledge of the crime.³⁹⁷

The Eisentrager Decision

In 1950, the Court received another case testing the legality of military tribunals, this time raising the issue whether the executive branch can detain, try, and execute individuals outside the United States without the independent review of federal courts. Did nonresident enemy aliens, tried and convicted in China by an American military tribunal for violations of the laws of war, have 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, while the Supreme Court was not.

The D.C. Circuit held that any person deprived of liberty by U.S. officials, and who can show that his confinement violates a prohibition of the Constitution, has a right to the writ regardless of whether he is a citizen or not. The appellate court noted that the Fifth Amendment applies broadly to “any person.”³⁹⁸ The court denied that its decision created a practical problem of transporting the 21 appellants to the

³⁹⁵ 2 Leon Friedman, ed., *The Law of War* 1450 (1972).

³⁹⁶ *Id.* at 1732 (emphasis in original).

³⁹⁷ Franklin A. Hart, “Yamashita, Nuremberg and Vietnam: Command Responsibility Reappraised,” 25 *Naval War Coll. Rev.* 19, 30 (1972). See also William H. Parks, “Command Responsibility for War Crimes,” 62 *Mil. L. Rev.* 1 (1973), Kenneth A. Howard, “Command Responsibility for War Crimes,” 21 *J. Pub. L.* 7 (1972), and William V. O’Brien, “The Law of War, Command Responsibility and Vietnam,” 60 *Geo. L. J.* 605 (1972).

³⁹⁸ *Eisentrager v. Forrestal*, 174 F.2d 961, 963 (D.C. Cir. 1949).

United States for a hearing, noting that the Supreme Court had decided *Quirin* without the personal presence of the German saboteurs.³⁹⁹

A 6-3 majority of the Supreme Court reversed, pointing to factual differences between the Nazi saboteurs and the 21 appellants. 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 tribunal sitting outside the United States for offenses against laws of law committed outside the United States, and were at all times imprisoned outside the United States.⁴⁰⁰ In denying the writ of habeas corpus and refusing review for these petitioners, the Court looked less to the constitutional powers of Congress and the President than it did to the meaning of “any person” in the Fifth Amendment. Writing for the Court, Justice Jackson remarked 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.”⁴⁰¹

The analogy here seems overdrawn. American soldiers tried by court-martial have more procedural protections than aliens tried by military tribunal. The issue was not whether aliens are entitled to superior rights but what rights they have, if any, before a tribunal. The Court declined to say. As with other tribunal cases during this period, Jackson said that it was “not for us to say whether these prisoners were or were not guilty of a war crime, or whether if we were to retry the case we would agree to the findings of fact or the application of the laws of war made by the Military Commission.”⁴⁰²

In deciding this type of case, 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 a “wholly indefensible” doctrine by permitting the executive branch, “by deciding whether its prisoners will be tried and imprisoned, to deprive all federal courts of their power to protect against a federal executive’s illegal incarceration.”⁴⁰³ To say that petitioners were denied the privilege of habeas corpus “solely because they were convicted and imprisoned overseas” was to adopt “a broad and dangerous principle.”⁴⁰⁴ The government had argued that habeas corpus was not available even to U.S. citizens convicted and imprisoned in Germany by American military tribunals.⁴⁰⁵

³⁹⁹ *Id.* at 968.

⁴⁰⁰ *Johnson v. Eisentrager*, 339 U.S. 763, 77 (1950).

⁴⁰¹ *Id.* at 783.

⁴⁰² *Id.* at 786.

⁴⁰³ *Id.* at 795.

⁴⁰⁴ *Id.*

⁴⁰⁵ *Id.*

Placing Limits on Military Courts

From 1952 to 1960, the Supreme Court began to consider and adopt restrictions on military courts, particularly their authority to try U.S. citizens stationed overseas and members of the military who left the service. The first series of cases involved civilian dependents located overseas. The government charged Yvette Madsen, a native-born U.S. citizen, with murdering her husband, an officer in 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 panel of five U.S. citizens. Her sentence was 15 years. In upholding the actions of these military courts, the Supreme Court examined the relative powers of the President and Congress and 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.”⁴⁰⁶ The Court further noted: “The policy of Congress to refrain from legislating in this unchartered area does not imply its lack of power to legislate.”⁴⁰⁷

Justice Black penned the sole dissent, expressing concern for the concentration of power within the executive branch: “Executive officers acting under presidential authority created the system of courts that tried her, promulgated the edicts she was convicted of violating, and appointed the judges who took away her liberty.”⁴⁰⁸ He said that whatever scope is granted to the President as Commander in Chief of the armed forces, “I think that if American citizens in present-day Germany are to be tried by the American Government, they should be tried under laws passed by Congress and in courts created by Congress under its constitutional authority.”⁴⁰⁹

Subsequent decisions began to narrow the broad scope given to military trials. In 1955, 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 supported the military, but Justice Black led the dissenters to insist that the case be reargued, particularly after the confirmation of John Marshall 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.⁴¹⁰

Writing for the Court, Justice 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

⁴⁰⁶ Madsen v. Kinsella, 343 U.S. 341, 348 (1952).

⁴⁰⁷ Id. at 348-49.

⁴⁰⁸ Id. at 372.

⁴⁰⁹ Id.

⁴¹⁰ Bernard Schwartz, Super Chief 180-81 (1983).

citizens. The Court ruled that ex-servicemen must be tried by federal civil courts.⁴¹¹ Although the case focused on a court-martial, its reasoning can 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 of people charged with offenses for which they can be deprived of their life, liberty or property.”⁴¹²

A series of lawsuits 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 Toyko for murdering her husband. After she was found guilty and sentenced to life imprisonment, the Court found no constitutional deficiency to the proceeding.⁴¹³ The decision was issued on June 11, 1956, just as the Court was completing its business for the term. In a section called a “Reservation,” Justice Frankfurter called attention to judicial haste: “Doubtless because of the pressure under which the Court works during its closing weeks,” several arguments “have been merely adumbrated in its opinion.”⁴¹⁴ A dissent by Warren, Black, and Douglas was 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.”⁴¹⁵

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 a federal prison for women.⁴¹⁶ The dissent by Warren, Black and Douglas in the earlier murdering wife case applied to this case as well.

The dissenters put pressure on the Court to rehear these cases.⁴¹⁷ Changes in Court membership helped shift the balance. Sherman Minton stepped down on October 15, 1956, with William Brennan taking his seat. The Court was further liberalized with the retirement of Stanley Reed on February 25, 1957. He was replaced by Stanley Whittaker.

After granting a petition for rehearing, the Court on June 10, 1957 reversed both decisions of the murdering wives. Whittaker did not participate in this case. The Court decided 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

⁴¹¹ *Toth v. Quarles*, 350 U.S. 11 (1955).

⁴¹² *Id.* at 17.

⁴¹³ *Kinsella v. Krueger*, 351 U.S.470 (1956).

⁴¹⁴ *Id.* at 483.

⁴¹⁵ *Id.* at 485-86.

⁴¹⁶ *Reid v. Covert*, 351 U.S. 487, 491 (1956).

⁴¹⁷ Schwartz, *Super Chief*, at 239-43.

III and the Fifth and Sixth Amendments. Citizens must be tried in Article III courts, not military courts.⁴¹⁸ 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.”⁴¹⁹

While acknowledging that the Court had not yet “definitively established to what extent the President, as Commander-in-Chief of the armed forces,” can promulgate the 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,” Justice Black struck 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.”⁴²⁰

Three decisions by the Court in 1960 placed further restrictions on the use of courts-martial abroad, covering civilian dependents of military personnel and civilian employees of the armed forces.⁴²¹ As with *Milligan* after the Civil War, the Court waited years after the conclusion of World War II before imposing limits on the use of military courts.

One other case in the post-World War II period deserves mention. U.S. District Judge Herbert J. Stern was “appointed” by the U.S. ambassador to the Federal Republic of Germany to sit on an occupation tribunal called the United States Court for Berlin. By accepting this assignment, Judge Stern seemed to be functioning as an agent of the executive branch, but he was soon to show his independence as an Article III judge.

Judge Stern called the case a criminal proceeding arising out of a hijacking of a Polish aircraft in 1978 by the defendants. Instead of a scheduled landing in East Berlin, the plane was forced down in West Berlin. U.S. authorities exercised jurisdiction over the dispute and convened the United States Court for Berlin. Defense counsel moved for a trial by jury. The prosecution objected, “contending that these proceedings are not governed by the United States Constitution, but by the requirements of foreign policy and that the Secretary of State, as interpreter of that policy, has determined that these defendants do not have the right to a jury trial.”⁴²²

The two defendants were Hans Detlef Alexander Tiede and Ingrid Ruske. On November 30, 1978, Dudley B. Bonsal, senior U.S. district judge, was sworn in as United States Judge for Berlin. He limited his participation to the promulgation of

⁴¹⁸ Reid v. Covert, 354 U.S. 1 (1957).

⁴¹⁹ Id. at 5.

⁴²⁰ Id. at 38-39.

⁴²¹ Kinsella v. Singleton, 361 U.S. 234 (1960); McElroy v. Guagliardo, 361 U.S. 281 (1960); Grisham v. Hagan, 361 U.S. 278 (1960).

⁴²² United States v. Tiede, 86 F.R.D. 227, 228 (U.S. Court for Berlin 1979).

rules of criminal procedure and was succeeded by Leo M. Goodman, former judge of the United States Court of the Allied High Commission for Germany. Tiede was brought before Judge Goodman and advised of his rights under the U.S. Constitution. Because of Tiede's indigency, Judge Goodman assigned a member of the Berlin criminal bar to serve as his counsel.

After short stints by Judges Bonsal and Goodman, on January 11, 1979, Judge Stern became the third United States Judge for Berlin. He appointed American counsel for the defendants because it was his intention to conduct the trial under American procedural law, "although German substantive law would apply."⁴²³ When Judge Bonsal promulgated the rules of criminal procedure for the court, with one exception he adopted "almost verbatim the Federal Rules of Criminal Procedure and the Federal Rules of Evidence." The exception eliminated jury trials as a constitutional requirement.⁴²⁴

The prosecution contended that the U.S. Constitution did not apply to the proceedings because Berlin was a territory governed by military conquest. Moreover, everything concerning the conduct of an occupation represented a "political question" and was thus not subject to review by U.S. courts. The U.S. occupation courts functioned as an extension of American foreign policy. Whatever rights were available to individuals brought before the United States Court for Berlin depended entirely on the decisions of the Secretary of State, and he determined, as a matter of foreign policy, that the right to a jury trial was not available to the defendants.⁴²⁵

Judge Stern found the arguments of the prosecution "to be entirely without merit."⁴²⁶ He cited *Ex parte Milligan* for this fundamental principle: "There has never been a time when United States authorities exercised governmental powers in any geographical area — whether at war or in times of peace — without regard for their own Constitution."⁴²⁷ Constitutional officers, including the Secretary of State, were subject to constitutional limitations when they exercised the powers of their office. The "applicability of any provision of the Constitution is itself a point of constitutional law, to be decided in the last instance by the judiciary, not by the Executive Branch."⁴²⁸ Judge Stern called attention to this language from *Milligan*:

[The Framers of the American Constitution] foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrevocable law. The history of the world had taught them that what was done in the past might be attempted in the future. *The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers*

⁴²³ Id. at 229.

⁴²⁴ Id. at 238.

⁴²⁵ Id. at 238-41.

⁴²⁶ Id. at 242.

⁴²⁷ Id.

⁴²⁸ Id.

with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority.⁴²⁹ [Emphasis added by Judge Stern.]

Judge Stern concluded that the position advanced by the prosecution would have “dramatic consequences” not only for Tiede and Ruske but for every person within the territorial limits of the U.S. sector of Berlin. Without constitutional limits, no one in the sector would have any protection from the “untrammelled discretion” of occupation authorities. If the Constitution did not apply, there would be no First Amendment, Fifth Amendment, Sixth Amendment, or even the Thirteenth Amendment’s prohibition of involuntary servitude. Without the Constitution, the Secretary of State would have the power “to arrest any person without cause, to hold a person incommunicado, to deny an accused the benefit of counsel, to try a person summarily and to impose sentence — all as a part of the unreviewable exercise of foreign policy.”⁴³⁰

In deciding the questions before him, Judge Stern was not concerned with the procedures that might be used by a U.S. military tribunal trying a case in wartime or during the belligerent occupation of enemy territory before war terminates.⁴³¹ The Tiede case, he said, did not involve spying or a violation of the laws of war, and he sat not as an international tribunal but as an American court. He placed Tiede and Ruske in the category of “friendly aliens,” not as enemy nationals, enemy belligerents, or POWs.⁴³² Judge Stern concluded that the Constitution required that they be tried by jury, relying extensively on Justice Black’s analysis in the 1957 case of *Clarice Covert*.⁴³³

Toward the end of the decision, Judge Stern reviewed the prosecution’s argument that the United States Court for Berlin “is a type of military commission and defendants tried by a military commission have no right to a jury trial.”⁴³⁴ To support that contention, the prosecution relied principally on the cases of the Nazi saboteurs and Yvette Madsen, the U.S. citizen convicted in Germany by a military commission for murdering her husband. He pointed out that the Court in *Quirin* found the eight Germans charged with an offense “against the law of war which the

⁴²⁹ Id.

⁴³⁰ Id. at 243.

⁴³¹ Id. at 244-45.

⁴³² Id. at 245.

⁴³³ Id. at 249-51.

⁴³⁴ Id. at 253.

Constitution does not require to be tried by jury,”⁴³⁵ but that Tiede and Ruske were not charged with violations of the laws of war, nor were they enemy aliens or associated with the armed forces of an enemy. As for the Madsen case, Judge Stern noted that the question of her right to a jury trial was never presented nor considered, she never claimed the right to a jury trial, and had in fact insisted that she be tried by a general court-martial under the Articles of War, which did not provide for trial by jury.⁴³⁶ Moreover, when Yvette Madsen was tried, the United States and Germany were technically still at war.⁴³⁷

Conclusions

Through the express grants of authority in Article I of the Constitution, Congress is empowered to create and define military courts, both courts-martial and military tribunals. William Winthrop, the premier 19th century authority on military law, wrote: “in general, 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 [the military commission] derives its original sanction.”⁴³⁸

Over the years, statutory actions that adopted and modified the Articles of War demonstrated congressional power. Executive initiatives were taken at times, including the tribunals established by General Scott in Mexico, but at every step he acknowledged Congress as the superior power and conceded that whatever policies he announced could be countermanded by Congress through the legislative process.

On a number of occasions, the executive branch has claimed that the President, as Commander in Chief, has independent authority to create military tribunals and determine their procedures and the penalties meted out. Under this interpretation, the President may act without congressional authority or even in the face of statutory restrictions. The Supreme Court has never accepted that argument. Instead, it has looked to statutory support for tribunals, as it did in the Nazi saboteur case. It decided that President Roosevelt had exercised authority “conferred upon him by Congress,” as well as whatever authority the Constitution granted the President.⁴³⁹

Could the President act independently, even in defiance of statutory policy? The Court found it “unnecessary for present purposes to determine to what extent the President as Commander in Chief has constitutional power to create military

⁴³⁵ Id.

⁴³⁶ Id. at 255.

⁴³⁷ Id. at 256.

⁴³⁸ Winthrop, *Military Law and Precedents*, at 831 (emphasis in original).

⁴³⁹ *Ex parte Quirin*, 317 U.S. at 28.

commissions without the support of Congressional legislation.”⁴⁴⁰ In acknowledging the power of Congress to define the law of war, the Court also recognized that Congress might not decide to enact specific rules for every occasion: “Congress has the choice of crystallizing in permanent form and in minute detail every offense against the law of war, or of adopting the system of common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts. It chose the latter course.”⁴⁴¹

In 1952, the Court upheld the actions of the President in establishing military tribunals and determining their jurisdiction and procedure in the “absence of attempts by Congress to limit the President’s power.” It also noted: “The policy of Congress to refrain from legislating in this unchartered area does not imply its lack of power to legislate.”⁴⁴²

The Court has repeatedly expressed concern about the concentration of power that would result if the executive branch alone had the power to create military tribunals. In 1946, it emphasized the important constitutional principle that courts “and their procedural safeguards are indispensable to our system of government,” and that the framers “were opposed to governments that placed in the hands of one man the power to make, interpret and enforce the laws.”⁴⁴³

In the cases that evolved from 1952 to 1957, Justice Black led the Court in rejecting military trials over civilians. Dissenting in the 1952 Yvette Madsen case, he objected that executive officers “acting under presidential authority created the system of courts that tried her, promulgated the edicts she was convicted of violating, and appointed the judges who took away her liberty.”⁴⁴⁴ Three years later he wrote for the Court: “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 of people charged with offenses for which they can be deprived of their life, liberty or property.”⁴⁴⁵ Writing for the Court in 1957, he warned that 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 a concentration of power, he said, ran counter to the core constitutional principle of separation of powers.⁴⁴⁶

Other federal judges have reached the same conclusion. U.S. District Judge Stern, in the Tiede case, rejected the government’s position that the executive branch can determine by itself the availability of constitutional safeguards, such as the right to a jury trial. Such power, he said, would allow the government “to arrest any

⁴⁴⁰ Id. at 29.

⁴⁴¹ Id. at 30.

⁴⁴² Madsen v. Kinsella, 343 U.S. at 348-49.

⁴⁴³ Duncan v. Kahanamoku, 327 U.S. at 322.

⁴⁴⁴ Madsen v. Kinsella, 343 U.S. at 372.

⁴⁴⁵ Toth v. Quarles, 350 U.S. at 17.

⁴⁴⁶ Reid v. Covert, 354 U.S. at 38-39.

person without cause, to hold a person incommunicado, to deny an accused the benefit of counsel, to try a person summarily and to impose sentence — all as a part of the unreviewable exercise of foreign policy.”⁴⁴⁷

⁴⁴⁷ United States v. Tiede, 86 F.R.D. at 243.