
MILITARY COMMISSIONS: PROBLEMS OF AUTHORITY AND PRACTICE

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INTRODUCTION

In deciding to authorize military commissions on November 13, 2001, President Bush relied primarily on the Supreme Court's decision in *Ex*

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parte Quirin (1942), which involved the trial of eight German saboteurs.¹ A close look at *Quirin* reveals a process and a decision with so many deficiencies that it should be remembered as a precedent not worth repeating. The same conclusion applies to the record of other U.S. military commissions over the past two centuries. In addition to issues surrounding precedents of dubious and disturbing quality, a second fundamental question arises: are these commissions created on the basis of constitutional authority conferred upon Congress, or may they be established by drawing on “inherent” authority available to the President? If the latter, there should be concern about a President concentrating all three powers—executive, legislative, and judicial—in a single branch and opening the door to undefined, and probably indefinable, emergency powers.

Allowing military commissions to operate on the exclusive authority of the President poses a challenge to basic principles of the U.S. Constitution, including the war prerogatives of Congress, separation of powers, and checks and balances. The framers believed that the rights and liberties of individuals can be best protected by structuring government in such a manner that power is not concentrated—and abused—in a single branch. In any war, including actions against terrorism, power must be vested in the federal government and executive agencies, but a democratic society requires Congress and the courts to closely monitor the exercise of authority.

I. A SYSTEM OF SEPARATION OF POWERS

The American constitutional system is founded on the principle of the separation of powers. Contrary to the willingness of some people today to defer to the government’s use of power after 9/11, the framers did not trust human nature. James Madison counseled: “Ambition must be made to counteract ambition.”² The framers depended on institutional structures to check power. Madison said in Federalist No. 47 that the “accumulation of all powers legislative, executive and judiciary in the same hands . . . may justly be pronounced the very definition of tyranny.”³ It was the military abuses by the King of England that drove colonial leaders in America to seek their independence and to limit the concentration of military power in the new republic.⁴

The Constitution seeks to ensure the separation of powers by providing Congress with broad authority to regulate armed conflict. Congress is

¹ Military Order of Nov. 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. 918 (2002); *Ex parte Quirin*, 317 U.S. 1 (1942).

² THE FEDERALIST NO. 51, at 349 (James Madison) (Jacob E. Cooke ed., 1961).

³ THE FEDERALIST NO. 47 (James Madison), *supra* note 2, at 324.

⁴ THE DECLARATION OF INDEPENDENCE para. 14 (U.S. 1776) (The king “has affected to render the Military independent of and superior to the Civil Power.”).

empowered to “declare War . . . and make Rules concerning Captures on Land and Water,” “define and punish . . . Offences against the Law of Nations,” and to “make Rules for the Government and Regulation of the land and naval Forces.”⁵ When the framers looked for guidance from the history of other governments, they saw a pattern of executives involving their countries in war not for the national interest but for goals inimical to the welfare of citizens.⁶ John Jay observed in *Federalist No. 4*:

It is too true, however disgraceful it may be to human nature, that nations in general will make war whenever they have a prospect of getting any thing by it, nay that absolute monarchs will often make war when their nations are to get nothing by it, but for purposes and objects merely personal, such as, a thirst for military glory, revenge for personal affronts; ambition or private compacts to aggrandize or support their particular families, or partizans. These and a variety of motives, which affect only the mind of the Sovereign, often lead him to engage in wars not sanctified by justice, or the voice and interests of his people.⁷

The framers did not depend on unchecked and inherent presidential power to protect the security of citizens. That model of government, promoted by such writers as Thomas Hobbes and William Blackstone, looked to royal prerogatives.⁸ The framers broke with monarchy and aristocracy to create a form of government where sovereignty and ultimate authority resided with the people, not the king. Madison concluded: “In republican government the legislative authority, necessarily, predominates.”⁹

A. *John André’s Precedent*

The system of separation of powers limits the Executive’s authority to establish military commissions to try and punish offenses. Ever since the Articles of War were enacted 230 years ago, Congress has regulated military justice, and no one considered it an infringement on executive power for lawmakers to determine how military courts try individuals in time of war. In 1775, the Continental Congress adopted rules and regulations for the military in a series of sixty-nine Articles of War.¹⁰ It thus established standards in advance to address such offenses as mutiny and sedition, and the Articles of War required that those actions be judged and punished by

⁵ U.S. CONST. art. I, § 8, cls. 10, 11, 14.

⁶ William Michael Treanor, *Fame, the Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695 (1996-97).

⁷ THE FEDERALIST NO. 4 (John Jay), *supra* note 2, at 18-19.

⁸ See generally FRANCIS D. WORMUTH, THE ROYAL PREROGATIVE 1603-1649 (1939); WILLIAM BLACKSTONE, 2 COMMENTARIES *237-80.

⁹ THE FEDERALIST NO. 51 (James Madison), *supra* note 2, at 350.

¹⁰ WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 953-60 (2d ed. 1920).

courts-martial rather than be left to the “discretion and judgment of military commanders or executive officials.”¹¹

The Justice Department mistakenly relies on the trial of the British spy, Major John André, in 1780 as a source of inherent presidential authority. Indeed, the Justice Department claims: “The President has inherent constitutional authority to create military commissions in the absence of Congressional authorization.”¹² That authority “has been exercised as an inherent military power since the founding of the Nation” and “is derived from the Commander-in-Chief Clause, which vests in the President the full powers necessary to prosecute a military campaign successfully.”¹³

To establish that point, the Justice Department argues that “[i]t was well recognized when the Constitution was written and ratified that one of the powers inherent in military command was the authority to institute tribunals for punishing enemy violations of the laws of war.”¹⁴ As an example, “during the Revolutionary War, George Washington, as Commander in Chief of the Continental Army, appointed a ‘Board of General Officers’ to try the British Major André as a spy.”¹⁵ According to the Justice Department, there was at that time “no provision in the American Articles of War providing for jurisdiction in a court-martial to try an enemy for the offense of spying.”¹⁶ Furthermore: “In investing the President with full authority as Commander in Chief, the drafters of the Constitution surely intended to give the President the same authority that General Washington possessed during the Revolutionary War to convene military tribunals to punish offenses against the laws of war.”¹⁷

During oral argument before the Supreme Court on March 28, 2006, in the case of *Hamdan v. Rumsfeld*, Paul D. Clement of the Justice Department began his presentation in this manner: “The executive branch has long exercised the authority to try enemy combatants by military commissions. That authority was part and parcel of George Washington’s authority as Commander in Chief of the Revolutionary Forces, as dramatically illustrated by the case of Major André. And that authority was incorporated into the Constitution. Congress has repeatedly recognized and sanctioned that authority.”¹⁸ This account by the Justice Department suggests that Washington operated on the basis of independent or inher-

¹¹ LOUIS FISHER, *MILITARY TRIBUNALS AND PRESIDENTIAL POWER: AMERICAN REVOLUTION TO THE WAR ON TERRORISM* 7 (2005) [hereinafter FISHER, *MILITARY TRIBUNALS*].

¹² Brief for Appellants at 57, *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2004) (No. 04-5393).

¹³ *Id.*

¹⁴ *Id.* at 58.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 58-59.

¹⁸ Transcript of Oral Argument at 36, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (No. 05-184).

ent executive authority in his capacity as Commander in Chief during time of war, rather than on statutory authority granted by Congress.

The history presented by the Justice Department, however, is false. The Continental Congress in 1776 adopted a resolution expressly providing that enemy spies “shall suffer death . . . by sentence of a court martial, or such other punishment as such court martial shall direct.”¹⁹ The Congress ordered that the resolution “be printed at the end of the rules and articles of war.”²⁰ Even before that, in 1775, Congress had made it punishable by court-martial for members of the continental army to “hold[] correspondence with, or . . . giv[e] intelligence to, the enemy.”²¹ The source of this authority is clearly legislative, not executive.

B. *Congressional Authority*

As Commander-in-Chief during the American Revolution, George Washington operated on the basis of legislative authority, not free-standing, free-wheeling, or independent executive authority. He adhered to the Articles of War by reviewing death sentences imposed by courts-martial,²² and he sometimes overturned those sentences for lack of legal basis.²³ Washington recognized that changes in the military code “can only be defined and fixed by Congress.”²⁴ Later, during the War of 1812, President James Monroe also understood that he could not make urgently needed changes to court-martial procedures on his own, and, consequently, he sought and obtained those revisions from Congress in advance.²⁵

No one questioned the authority of Congress to define the rules of war. Under Section 8 of Article I of the Constitution, Congress is empowered to “define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.”²⁶ Further, it is the responsibility of Congress to “make Rules for the Government and Regulation of the land and naval Forces.”²⁷ Placing this rule-making authority in Congress marked a significant rejection of British precedents. British kings had been accustomed to issue, on their own authority, Articles of War

¹⁹ 5 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 693 (Gaillard Hunt ed., 1912).

²⁰ *Id.*

²¹ American Articles of War of 1775, *reprinted in* WINTHROP, *supra* note 10, at 955. For details on André’s execution, see FISHER, *MILITARY TRIBUNALS*, *supra* note 11, at 11-13.

²² 13 THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES, 1745-1799, at 136-40 (John Clement Fitzpatrick ed., 1931).

²³ *See* 11 *id.* at 262.

²⁴ 17 *id.* at 239.

²⁵ FISHER, *MILITARY TRIBUNALS*, *supra* note 11, at 23.

²⁶ U.S. CONST. art. I, § 8, cl. 10.

²⁷ U.S. CONST. art. I, § 8, cl. 14.

and military rules.²⁸ 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 “natural incident to the preceding powers to make war, to raise armies, and to provide and maintain a navy.”²⁹ 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.”³⁰ Story continued: “The whole power [of war] is far more safe in the hands of congress, than of the executive; since otherwise the most summary and severe punishments might be inflicted at the mere will of the executive.”³¹

Just as the Rules and Regulation Clause empowers Congress to legislate on military law within the United States, so does the constitutional provision dealing with “Offences against the Law of Nations” authorize Congress to pass legislation dealing with law in an international context.³² After America’s declaration of independence from Britain, the Continental Congress passed legislation giving shape to the law of nations by enacting national policy for captures, seizures, prizes, and reprisals of all ships and goods taken during hostilities and by creating a Court of Appeals in Cases of Captures.³³ Captains and commanders of private armed vessels were instructed to “tak[e] care not to infringe or violate the laws of nations, or laws of neutrality.”³⁴

Congress passed legislation in 1790 to prescribe punishments for certain crimes against the United States.³⁵ One provision established fines and imprisonment for any person who attempted to prosecute or bring legal action against an ambassador or other public minister from another country.³⁶ Persons who took such actions were deemed “violators of the laws of nations” who “infract the law of nations.”³⁷ As James Kent noted in *Commentaries*, an action against an ambassador or public minister “tends to provoke the resentment of the sovereign who the ambassador represents, and to bring upon the state the calamities of war.”³⁸

A treatise in 1809 explained that U.S. martial law derived from congressional action in the same manner as domestic law. The treatise noted

²⁸ WINTHROP, *supra* note 10, at 18-19.

²⁹ JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 418 (Ronald D. Rotunda & John E. Nowak eds., 1987).

³⁰ *Id.*

³¹ *Id.*

³² U.S. CONST. art. I, § 8, cl. 10.

³³ See 19 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, *supra* note 19, at 354-56, 360-64, 374-75; 20 *id.* at 761-67; 21 *id.* at 1135-37, 1152-58.

³⁴ See 19 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, *supra* note 19, at 361.

³⁵ 1 Stat. 112, ch. 9 (1790).

³⁶ 1 Stat. 117-18, § 25 (1790).

³⁷ 1 Stat. 118, §§ 26-28 (1790).

³⁸ 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 170 (1826).

that “[m]artial law, as it exists in this country, forms part of the Laws of the Land; and it is enacted by the same authority which is the origin of all other statutory regulations.”³⁹ Martial law in America derives from the rules and Articles of War adopted by Congress. Legislation in 1789 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.⁴⁰ Revisions in 1806 consisted of 101 Articles of War.⁴¹ Many of the provisions defined the punishments and procedures to be followed by courts-martial. Prisoners, for example, were not required to testify.⁴² No person “shall be sentenced to suffer death, but by the concurrence of two thirds of the members of a general court martial.”⁴³ All of these policies derived from legislative deliberation and enactment.

C. *Andrew Jackson’s Exploits*

During the War of 1812, General Andrew Jackson invoked martial law as commander of American forces at New Orleans.⁴⁴ After his victory over the British, citizens expected him to rescind the order for martial law, but he chose to wait for official word of peace negotiations underway at Ghent.⁴⁵ An article in the local newspaper, signed anonymously, argued that persons accused of a crime should be heard before a civil judge, not military tribunals, and criticized Jackson’s policy as “no longer compatible with our dignity and our oath of making the Constitution respected.”⁴⁶ Jackson learned the identity of the author and had him arrested on March 5, 1815 for inciting mutiny and disaffection in the army.⁴⁷ When the writer’s lawyer went to U.S. District Judge Dominick Augustin Hall to request a writ of habeas corpus, and the judge granted it, Jackson had the judge arrested as well.⁴⁸ Judge Hall, accused of “aiding abetting and exciting mutiny,” was locked up in the same barracks as the writer.⁴⁹

³⁹ ALEXANDER MACOMB, *A TREATISE ON MARTIAL LAW AND COURTS-MARTIAL* 7 (1809).

⁴⁰ 1 Stat. 96, § 4 (1789).

⁴¹ 2 Stat. 359-372 (1806).

⁴² *See id.* at 368, art. 70.

⁴³ *Id.* at 369, art. 87.

⁴⁴ 3 *THE PAPERS OF ANDREW JACKSON* 205 (Harold D. Moser ed. 1991).

⁴⁵ ROBERT V. REMINI, *ANDREW JACKSON AND THE COURSE OF AMERICAN EMPIRE, 1767-1821*, at 309 (1977).

⁴⁶ *Id.* at 310.

⁴⁷ *Id.*

⁴⁸ *See* 2 *THE CORRESPONDENCE OF ANDREW JACKSON* 183 (John Spencer Bassett ed. 1926) (letter to Lt. Col. Mathew Arbuckle, March 5, 1815).

⁴⁹ *Id.*; REMINI, *supra* note 45.

A military trial acquitted the writer, in part because he challenged the jurisdiction of the court to try someone who was not a member of the militia or the army.⁵⁰ As to the charge of spying, the military court thought it far-fetched that a spy would publish his views in a local newspaper.⁵¹ Nevertheless, Jackson ordered that the writer be kept in jail while recognizing that there was little chance of the military court deciding against Judge Hall.⁵² He thus ordered the judge out of the city, not to return until the official announcement of peace or until the British left the southern coast.⁵³ On March 12, Jackson's troops marched Hall four miles outside of New Orleans and left him there.⁵⁴ When official notice of the peace treaty reached Jackson the next day, he revoked martial law and released the writer.⁵⁵

Judge Hall made his way back to the city and bided his time until celebrations were over. After court proceedings, Hall fined Jackson \$1,000 for contempt, Jackson paid the amount, and toward the end of his life Congress passed legislation to reimburse Jackson for the fine.⁵⁶ Debate on the bill was lengthy and complex because lawmakers differed sharply on whether more credit was due to Jackson for defending New Orleans or to Judge Hall for defending the Constitution.⁵⁷

In its effort to discover inherent authority for the President to create military tribunals, the Justice Department also turns to the military trial of two British citizens, Alexander Arbuthnot and Robert Christy Ambrister, during the Seminole War in Florida in 1818. The Justice Department maintains that throughout the history of the United States “[p]residents have exercised their inherent authority as Commanders in Chief to establish military commissions, without any authorization from Congress,” and cites the Arbuthnot-Ambrister trials as evidence.⁵⁸ The trials, in fact, establish no inherent powers for the President, underscore the abuses to which military commissions are prone, and highlight the need for Congress and the courts to maintain close oversight and control of the executive branch's operation of military commissions. After the tribunal changed its sentence against Ambrister from death to corporal

⁵⁰ REMINI, *supra* note 45, at 311.

⁵¹ *Id.*

⁵² *Id.*

⁵³ See 2 THE CORRESPONDENCE OF ANDREW JACKSON, *supra* note 48, at 189 (letter to Capt. Peter Ogden, March 11, 1815, and order to Judge Hall, March 11, 1815).

⁵⁴ REMINI, *supra* note 45, at 312.

⁵⁵ 3 THE PAPERS OF ANDREW JACKSON, *supra* note 44, at 310; REMINI, *supra* note 45, at 312.

⁵⁶ FISHER, MILITARY TRIBUNALS, *supra* note 11, at 26-28.

⁵⁷ CONG. GLOBE, 28th Cong., 1st Sess. 87 (1843) (Rep. Stephens “was convinced that, in future ages, the Judge would stand higher in the public estimation for his defense of the laws than the General would for defending the city.”)

⁵⁸ Brief for Appellants, *supra* note 12, at 59.

punishment, General Andrew Jackson overrode that decision and ordered Ambrister shot; Jackson's order was carried out.⁵⁹ President James Monroe did not defend Jackson or attempt to justify his action on the basis of executive authority. Instead, Monroe distanced himself from Jackson's decision and forwarded documents about the case when Congress requested them for legislative investigation.⁶⁰ Monroe thus recognized that the branch ultimately in control of military commissions was the legislature, not the executive.⁶¹

The following year, the House Committee on Military Affairs issued a critical report of the trials. It found that no law authorized the men to be tried before a military court for the alleged offenses, except the charge that Arbuthnot was "acting as a spy," of which he was found not guilty, and concluded that there was not even "a shadow of necessity for [their] death."⁶² The committee found it "remarkable" that Jackson would seek to justify the tribunals on the ground that the men were pirates or outlaws since the former characterization applies only to "offences upon the high seas" and the latter description "applies only to the relations of individuals with their own Governments."⁶³

A Senate report likewise rejected the theory that Arbuthnot and Ambrister were "outlaws and pirates" and further noted that "[h]umanity shudders at the idea of a cold-blooded execution of prisoners, disarmed, and in the power of the conqueror."⁶⁴ The prominent military jurist William Winthrop later remarked that if an officer had ordered the execution as Jackson had then that officer "would now be indictable for murder."⁶⁵ These examples illustrate the close attention by Congress to the standards that should govern military trials.

D. *The Mexican War*

One of the more attractive and defensible uses of military tribunals occurred during the Mexican War, but this period offers no support for inherent presidential power. General Winfield Scott, placed in command of U.S. troops in Mexico, worried about the lack of discipline among his raw, volunteer soldiers. Before he left Washington, D.C., he drafted an order seeking martial law in Mexico for both American soldiers and Mexican citizens and hoped that Congress would pass legislation to authorize

⁵⁹ FISHER, *MILITARY TRIBUNALS*, *supra* note 11, at 28-29.

⁶⁰ See 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 612 (Richardson ed., 1925).

⁶¹ *Id.*; 15 ANNALS OF CONGRESS 2136-50 (1818).

⁶² 1 American State Papers: Military Affairs 735 (1819).

⁶³ *Id.*

⁶⁴ 15 ANNALS OF CONGRESS, *supra* note 61, at 267 (citation omitted).

⁶⁵ WINTHROP, *supra* note 10, at 465 (emphasis omitted).

a military tribunal.⁶⁶ In seeking legislation, Scott underscored the point that the basic authority for creating military tribunals lay with Congress, not with the executive branch or some type of inherent power.

Scott knew from his reading of military history that undisciplined and abusive actions by American soldiers in Mexico could trigger an insurgency. He was familiar with the experience of France, under Napoleon's command, of sparking a guerrilla uprising in Spain in response to plunder and rape by French soldiers.⁶⁷ Scott designed his martial law order to guarantee Mexican property rights, to realize the sanctity of religious structures, and to create a sense of fairness and justice to the American occupation.⁶⁸ Much of the martial law order, however, depended on the existing Articles of War, particularly the 65th, 66th, 67th, and 97th.⁶⁹

Scott's General Orders No. 20, issued on February 19, 1847, proclaimed a state of martial law at Tampico and announced that certain acts specified in the order by civilians or military persons would be tried before military tribunals.⁷⁰ He was particularly concerned about the behavior of "the wild volunteers" who, as soon as they reached Mexico, "committed, with impunity, all sorts of atrocities on the persons and property of Mexicans."⁷¹ Many of these violations were not covered by the statutory Articles of War.⁷²

Scott never questioned the ultimate authority of Congress to control military tribunals. In order to "suppress these disgraceful acts abroad," he issued the martial law order "until Congress could be stimulated to legislate on the subject."⁷³ Under his order, "all offenders, Americans and Mexicans, were alike punished—with death for murder or rape, and for other crimes proportionally."⁷⁴ Scott concluded 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 in an invading army."⁷⁵

Scott sought clarification from Congress, but Congress did not enact any legislation.⁷⁶ Yet his martial law and the operation of military tribunals succeeded in sending an instructive message to both Mexican citizens and U.S. soldiers: misconduct by either side would result in swift and

⁶⁶ TIMOTHY D. JOHNSON, WINFIELD SCOTT: THE QUEST FOR MILITARY GLORY 165 (1998); 2 JUSTIN H. SMITH, THE WAR WITH MEXICO 220 (1919).

⁶⁷ JOHNSON, *supra* note 66, at 166.

⁶⁸ *Id.* at 166-68.

⁶⁹ 2 MEMOIRS OF LIEUTENANT-GENERAL SCOTT 544 (1864).

⁷⁰ *Id.* at 540.

⁷¹ *Id.* at 392.

⁷² *See id.* at 393.

⁷³ *Id.*

⁷⁴ *Id.* at 395.

⁷⁵ *Id.* at 396.

⁷⁶ FISHER, MILITARY TRIBUNALS, *supra* note 11, at 33.

severe punishment. One American, convicted of raping and robbing a Mexican woman, was hanged.⁷⁷ That type of action helped persuade the local population that the system of justice would assure fair and even-handed procedures. The tribunals helped minimize resistance and guerrilla activity. Scott also looked to state policy to limit the reach of his order.⁷⁸ Tribunals in Mexico resulted in the trials of 117 individuals. Most were Americans: either soldiers (seventy-four) or Americans who were not soldiers (twelve). The overall conviction rate for Mexican nationals was slightly lower than for Americans.⁷⁹ Scott's conduct during this period was not one of executive aggrandizement but rather of deference to congressional authority and to the practical needs of averting insurgency.

E. *Scope of Executive Authority*

Throughout the first seven decades of American independence, scholars and 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."⁸⁰ 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."⁸¹

In 1818, Attorney General William Wirt issued a legal memorandum on the authority needed to order a new trial before a military court.⁸² 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."⁸³ During the proceedings of a court-martial, the Judge Advocate General refused to arraign an officer because he had already been tried by a court-martial on the same charge.⁸⁴ The President disapproved of the first court's sentence.⁸⁵ The question to Wirt: Could the President order a new trial?⁸⁶ Wirt reasoned that the President

⁷⁷ H. Exec. Doc. No. 56, 30th Cong., 1st Sess. 125-26 (1848).

⁷⁸ *Id.*

⁷⁹ David Glazier, *Kangaroo Court or Competent Tribunal?: Judging the 21st Century Military Commission*, 89 VA. L. REV. 2005, 2031-32 (2003).

⁸⁰ MACOMB, *supra* note 39, at 8-9.

⁸¹ *Id.* at 9.

⁸² 1 Op. Att'y Gen. 233 (1818).

⁸³ Act of April. 10, 1806, ch. 20, art. 87, 2 Stat. 359, 369.

⁸⁴ See 1 Op. Att'y Gen. 233 (1818).

⁸⁵ *Id.*

⁸⁶ *Id.* at 234.

“has no powers except those derived from the constitution and laws of the United States; if the power in question, therefore, cannot be fairly deduced from these sources, it does not exist at all.”⁸⁷ Wirt did not attempt to draw inherent powers from the Commander-in-Chief Clause. Wirt stated:

[I]n a government limited like ours, it would not be safe to draw from this provision inferential powers, by a forced analogy to other governments differently constituted. Let us draw from it, therefore, no other inference than that, under the constitution, the President is the national and proper depository of the final appellate power, in all judicial matters touching the police of the army; but let us not claim this power for him, unless it has been communicated to him by some specific grant from Congress, the fountain of all law under the constitution.⁸⁸

Wirt noted that Congress had granted the President an appellate power over certain types of military trials.⁸⁹ 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.”⁹⁰ Nevertheless, a 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 proceeding 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.”⁹¹ This discretionary authority of the President existed because of statutory action, not because of some theory of inherent executive power.

II. THE CIVIL WAR PERIOD

During the United States’s Civil War, military commissions were established initially to address “crimes and military offenses . . . not triable or punishable by courts-martial and . . . not within the jurisdiction of any existing civil court.”⁹² These commissions were clearly grounded in statutes that recognized their existence and operation as early as 1862.⁹³

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Act of March 16, 1802, ch. 9, § 10, 2 Stat. 132, 134. Wirt inaccurately refers to this as “the 14th section of the act.”

⁹¹ *Id.*

⁹² 1 THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES, Ser. II, at 247 (1894) [hereinafter THE WAR OF THE REBELLION] (quoting army general order dated January 1, 1862).

⁹³ See, e.g., Act of July 17, 1862, ch. 201, § 5, 12 Stat. 597, 598 (“[T]he President shall appoint . . . a judge advocate general . . . to whose office shall be returned, for

Francis Lieber explained that the comprehensive standards he developed to enable commanders in the field to wage war effectively and humanely were issued as an army general order rather than as a “code” because the latter indicated something that the President “has no right to issue—something which requires the assistance of Congress—an enactment.”⁹⁴

A. *Tribunal Procedures*

More recently, the Justice Department has argued that military commissions “have tried enemy combatants since the earliest days of the Republic under such procedures as the President has deemed fit.”⁹⁵ That argument defines presidential power much too broadly. Instead, military procedures during the Mexican War applied the same procedures, granted the same rights to the accused, utilized the same rules of evidence, and accorded the same post-trial review as did courts-martial.⁹⁶ Similarly, the Civil War saw an effort to conform procedures used in military commissions to those used in courts-martial. Military commissions “should be ordered by the same authority, be constituted in a similar manner and their proceedings be conducted according to the same general rules as courts-martial in order to prevent abuses which might otherwise arise.”⁹⁷

President Abraham Lincoln, with the assistance of the office of Adjutant General, and in order to assure that procedures were properly followed, often overturned the work of military commissions. A tribunal in St. Louis charged a civilian with giving aid and comfort to the enemy and sentenced him to be shot. After the trial proceedings were presented to the White House, it was there held that “[n]othing is proved against the prisoner after he had taken the oath of allegiance, except the utterance of very disloyal sentiments. No acts are shown which would warrant the sentence of death. The sentence is remitted.”⁹⁸ President Lincoln, after reviewing a Missouri tribunal’s order to execute a defendant found guilty

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

⁹⁴ R. R. Baxter, *The First Modern Codification of the Law of War: Francis Lieber and General Orders No. 100*, 3 INT’L REV. RED CROSS 171, 185 (1963).

⁹⁵ Brief for Appellants, *supra* note 12, at 53.

⁹⁶ Glazier, *supra*, note 79, at 2030-31. The one exception, the “Councils of War,” which tried individuals for offenses related directly to the war, was a brief experiment which was discontinued during the Civil War in favor of the single military commission. *Id.* at 2033.

⁹⁷ Gen. Order No. 1, HQ, Dept. of the Missouri, Jan. 1, 1862; THE WAR OF THE REBELLION, *supra* note 92, at 248. See also Act of July 17, 1862, ch. 201, § 5, 12 Stat. 597, 598 (same post-conviction review in both military commissions and courts-martial).

⁹⁸ U.S. War Department General Orders No. 230, July 23, 1863, *reprinted in* 5 U.S. WAR DEPARTMENT, GENERAL ORDERS 1863, at 2-3, 6 (Library of Congress, Nos. 201-300) (emphasis in original).

of murder, disapproved of the sentence because the record was “fatally defective.”⁹⁹ Also turned aside, for the same reason, was a tribunal’s order that an individual be shot for murder and for threatening to kill two other people.¹⁰⁰

An 1863 tribunal in Virginia sentenced an individual to death, but he was released after the Adjutant General’s office determined that the sentence “is inoperative, on account of informality in the proceedings of the Commission.”¹⁰¹ The record did not show that the order convening the tribunal had been read to the prisoner, that he was given the opportunity to object to any member of the commission, that the charge against him had been put in writing, “or that he had, in advance of the examination of the witnesses, any knowledge of the offence for which he was to be tried; nor [was] it shown that the prisoner was allowed to plead to the charge against him as recited in the order convening the Commission.”¹⁰² The office concluded that in a proceeding involving life, “such irregularities are wholly inexcusable, and make the execution of the death sentence legally impossible.”¹⁰³ The record reflects not wholesale adoption of procedures by the President but the careful supervision of those already in place.

B. *Dakota Indians*

The military tribunals active in Minnesota in 1862 demonstrate that the Executive’s ability to interfere with military tribunals—if it exists at all—remains contingent on Congressional approval. Violence in Minnesota between Dakota Indians and American settlers resulted in the deaths of “77 American soldiers, 29 citizen-soldiers, approximately 358 settlers, and an estimated 29 Dakota soldiers.”¹⁰⁴ A five-member military tribunal, with some of the proceedings lasting no more than five minutes, convicted 323 Dakota Indians and recommended the hanging of 303 of the guilty defendants.¹⁰⁵

Legislation passed by Congress, however, prevented the military from carrying out the executions without White House review, and, consequently, President Lincoln reduced markedly the number of executions planned by the military in Minnesota against the Dakota (or Sioux) community. Congress had decreed that for all courts-martial and military tribunals, “no sentence of death, or imprisonment in the penitentiary,

⁹⁹ *Id.* at 3-6.

¹⁰⁰ *Id.* at 5-6.

¹⁰¹ *Id.* at 7.

¹⁰² *Id.*

¹⁰³ U.S. War Department General Orders No. 257, *supra* note 98.

¹⁰⁴ Carol Chomsky, *The United States-Dakota War Trials: A Study in Military Injustice*, 43 STAN. L. REV. 13, 21-22 (1990).

¹⁰⁵ KENNETH CARLEY, *THE SIOUX UPRISING OF 1862*, at 69 (2nd ed. 1976). *See also supra* note 104, at 27.

shall be carried into execution until the same shall have been approved by the President.”¹⁰⁶

Lincoln was warned that if he failed to allow the executions to take place, the people of Minnesota would take law into their hands and massacre some 1,500 women, children, and elderly Indians still held prisoner.¹⁰⁷ Lincoln nonetheless reduced the number of planned executions to thirty-nine and commuted or pardoned the rest.¹⁰⁸ Because subsequent evidence cast doubt on the guilt of one of the accused, only thirty-eight of the 323 initially convicted Dakota Indians were executed.¹⁰⁹ Lincoln used his supervisory powers to assure justice to the accused and to maintain political stability in territories under federal control.

C. *Other Civil War Precedents*

The Supreme Court, in *Ex parte Milligan* (1866), curtailed the use of military commissions shortly after the Civil War ended. Although the Court decided *Milligan* on other constitutional grounds (forbidding the use of military commissions for civilians except when courts are closed),¹¹⁰ Chief Justice Chase reaffirmed the traditional understanding that military jurisdiction must be expressly authorized by Congress.¹¹¹ When military commissions were next used to suppress insurrection and violence in the South during the post-war military occupation, they were expressly authorized by statute.¹¹²

Military commissions have typically been confined to a zone of combat operations or occupied territory. The military commissions used during the Mexican War took place in occupied territory and enabled the commander there to establish order over both U.S. troops and Mexicans.¹¹³ Similarly, most military commissions during the Civil War occurred in Union-occupied confederate territory and “strife-torn border states.”¹¹⁴

¹⁰⁶ Act of July 17, 1862, ch. 201 § 5, 12 Stat. 597, 598.

¹⁰⁷ See S. Ex. Doc. No. 7, 37th Cong., 3d Sess. 4 (1862); 13 THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES, Ser. I, at 788 (1880).

¹⁰⁸ See *id.* at 2, 6-7.

¹⁰⁹ Chomsky, *supra* note 104, at 34. See also DAVID A. NICHOLS, LINCOLN AND THE INDIANS: CIVIL WAR POLICY AND POLITICS 94-118 (2000), and FISHER, MILITARY TRIBUNALS, *supra* note 11, at 51-55.

¹¹⁰ See *Ex Parte Milligan*, 71 U.S. 2, 127 (1866).

¹¹¹ *Id.* at 139-40 (Chase, C.J., concurring). See also WINTHROP, *supra* note 10, at 836 (absent express statutory authorization, jurisdiction of military commission is limited to offenses committed “within the field of the command of the convening commander” and within “the theater of war or a place where military government or martial law may legally be exercised”).

¹¹² See Act of March 2, 1867, ch. 153, § 3, 14 Stat. 428.

¹¹³ See discussion *supra* Part I.D.

¹¹⁴ MARK E. NEELY, JR., THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES 168-69 (Oxford Univ. Press 1991).

As military commissions became more widespread, however, serious abuses resulted. For example, Captain Henry Wirz, the superintendent of the notorious Andersonville prison, was unfairly blamed by a military commission for the conditions there and was “hurried to his death by vindictive politicians, an unbridled press, and a nation thirsty for revenge.”¹¹⁵ Furthermore, the military commission hastily created to try alleged conspirators in Lincoln’s assassination was, in the words of Lincoln’s former Attorney General, Edward Bates, “not only unlawful, but . . . a gross blunder in policy: It denies the great, fundamental principle, that ours is a government of *Law*”¹¹⁶ Indeed, 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.”¹¹⁷ 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 only known rule of proceeding.”¹¹⁸ Moreover, Judge R. A. Watts, who served as acting Assistant Adjutant General at the trial of the conspirators in the plot to assassinate Lincoln, 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.”¹¹⁹

III. REVISING THE ARTICLES OF WAR

After enacting the Articles of War in 1806, Congress did not subject them to comprehensive revision for more than a century. The Articles of War were reenacted in 1874, as part of a codification effort, but the revisers were not allowed “to go beyond the reconciling of contradictions, the supplying of obvious omissions, and the curing of imperfections in form and language.”¹²⁰ In reality, the task of revisers is generally to look for redundant or obsolete material and, during the nineteenth century, Congress at times enacted new Articles or revised some existing Articles but

¹¹⁵ Darrett B. Rutman, *The War Crimes and Trial of Henry Wirz*, 6 CIVIL WAR HIST. 117, 118 (1960). See FISHER, *MILITARY TRIBUNALS*, *supra* note 11, at 62-65.

¹¹⁶ EDWARD BATES, *THE DIARY OF EDWARD BATES, 1859-1866*, at 483 (Howard Beale ed., Gov’t Printing Office 1933) (emphasis in original).

¹¹⁷ *Id.* at 502 (emphasis in original).

¹¹⁸ *Id.* (emphasis in original). See FISHER, *MILITARY TRIBUNALS*, *supra* note 11, at 65-70.

¹¹⁹ Judge R. A. Watts, *The Trial and Execution of the Lincoln Conspirators*, 6 MICH. HIST. MAG. 81, 99 (1922).

¹²⁰ S. REP. NO. 63-229, at 20 (1914).

never attempted a full-fledged revision. For example, a statute in 1890 amended only one of the Articles of War.¹²¹

A. *Hearings in 1912*

The process of bringing the Articles up to date began in 1912 when the House Committee on Military Affairs held hearings to consider a bill designed to revise the Articles of War. Secretary of War Henry L. Stimson called the existing Articles “notoriously unsystematic and unscientific.”¹²² At these hearings, Judge Advocate General E. H. Crowder drew attention to a new article on military commissions, which he described as 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.”¹²³ Of course, Congress had previously recognized the work of military commissions, particularly during the period from 1862 to 1864.¹²⁴ Crowder, when asked about the military commissions, called them “common law of war court[s]” never regulated by statute.¹²⁵ That testimony, however, was false. Congress had often regulated military commissions, such as providing specific procedures to be used during their operation.¹²⁶ By referring to military commissions as a common law of war court, Crowder appeared to want to ground the authority to establish military commissions not in any statute but in some type of inherent executive authority. As he explained at subsequent hearings, these war courts grew out of “usage and necessity.”¹²⁷

Crowder’s presumed objective was threatened with a piecemeal revision of the Articles of War in 1913. New language gave general courts-martial the power to try any person subject to military law for any crime

¹²¹ See An Act: To Amend the Articles of War Relative to the Punishment on Conviction by Courts-Martial, ch. 998, 26 Stat. 491 (1890).

¹²² *Revision of the Articles of War*, hearing before the House Committee on Military Affairs,” 62d Cong., 2d 3 (1912).

¹²³ *Id.* at 29.

¹²⁴ See An Act: To Amend the Act Calling Forth the Militia to Execute the Laws of the Union, Suppress Insurrections, and Repel Invasions, ch. 201, § 5, 12 Stat. 598, (1862); An Act: For Enrolling and Calling out the National Forces, and for Other Purposes, ch. 75, § 30, 12 Stat. 736 (1863); An Act: To Prevent and Punish Frauds upon the Revenue, to Provide for the More Certain and Speedy Collection of Claims in Favor of the United States, and for Other Purposes, ch. 75, § 38, 12 Stat. 737 (1863); An Act: To Provide for the More Speedy Punishment of Guerilla Marauders, and for Other Purposes, ch. 215, § 1, 13 Stat. 356 (1864); An Act: To Provide for the Better Organization of the Quartermaster’s Department, ch. 253, § 6, 13 Stat. 397 (1864).

¹²⁵ *Revision of the Articles of War*, hearing before the House Committee on Military Affairs, 62d Cong. 35 (1912).

¹²⁶ 12 Stat. 598, § 5 (1862); 12 Stat. 736, § 30 (1863); 13 Stat. 356, § 1 (1864); 13 Stat. 397, § 6 (1864).

¹²⁷ S. REP. NO. 64-130, at 41 (1916). This report includes the transcript of the hearings.

punishable by the Articles of War, and the new language also gave general courts-martial jurisdiction over “any other person who by statute or by the law of war is subject to trial by military tribunals.”¹²⁸ Whether that statutory language eliminated the need for the type of military tribunals advocated by Crowder remained an open question.

B. *Concurrent Jurisdiction*

To forestall the obviation of Crowder’s preferred tribunals, 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.”¹²⁹

The Senate Committee on Military Affairs reported legislation in 1914 to revise the Articles of War.¹³⁰ During floor action the following year, the Articles were added as an amendment to an army appropriations bill.¹³¹ As enacted in 1916, Crowder’s language for the new 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.¹³²

If this was Crowder’s effort to establish some type of inherent executive authority, it was a strange strategy to rely on statutory language.

New controversies erupted in 1917 because of several sensational cases brought forward to highlight excessive and unjust punishment of American soldiers during World War I and charges that military law lacked ade-

¹²⁸ Pub. L. No. 62-401, ch. 93, 37 Stat. 722 (1913).

¹²⁹ *Revision of the Articles of War*, hearing before the House Committee on Military Affairs, 62d Cong. 29 (1912).

¹³⁰ See S. REP. NO. 63-229 (1914).

¹³¹ See 52 CONG. REC. 4290, 4296-4303 (1915). See also S. REP. NO. 64-130 (1916) and 53 CONG. REC. 11474, 11504-13 (1916).

¹³² Pub. L. No. 64-242, ch. 418, 39 Stat. 653 (1916). An earlier appropriations bill, also containing the Articles of War, was vetoed by President Wilson because of a dispute over language concerning the treatment of retired officers. H.R. Doc. No. 1334, 64th Cong., 1st sess. (1916). Congress did not challenge the veto of the bill (H.R. 16460).

quate procedures and sufficient opportunities for proper review.¹³³ In 1920, Congress decided to put the new Articles of War not in an appropriations bill but, instead, in an authorization measure called National Defense Act Amendments.¹³⁴ As reported by the House Committee on Military Affairs, the National Defense Act did not contain the new Articles.¹³⁵ However, the Senate included the Articles in its bill, as did the conferees.¹³⁶ 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.¹³⁷

The 1920 statute refers to military tribunals at several other places, such as provisions dealing with self-incrimination, depositions, courts of inquiry, contempts, presidential authority to prescribe procedural rules, captured or abandoned property, assisting the enemy, spies, and the appointment of reporters and interpreters.¹³⁸

During Senate hearings in 1916, Crowder discussed the option of using courts-martial and tribunals, explaining that Article 15 “just saves to these war courts [tribunals] the jurisdiction they now have and makes it a concurrent jurisdiction with courts-martial, so that the military commander in the field in time of war will be at liberty to employ either form of court that happens to be convenient.”¹³⁹ He then added: “Both classes of courts have the same procedure.”¹⁴⁰ That has not always been the case. The procedures for courts-martial have been spelled out in statu-

¹³³ See Herbert F. Margulies, *The Articles of War, 1920: The History of a Forgotten Reform*, 43 MIL. AFF. 85 (1979).

¹³⁴ See H.R. 12775, 66th Cong., 2d Sess. (1920).

¹³⁵ See H.R. REP. NO. 66-80 (1920).

¹³⁶ H.R. REP. NO. 66-1049, at 66 (1920); 59 CONG. REC. 7834 (1920). An earlier committee on conference was unable to reach agreement because of a dispute over the National Guard; H.R. REP. NO. 66-1000 (1920). For Senate hearings in 1919 on the Articles of War, see *Establishment of Military Justice, Hearings before the Subcommittee of the Senate Committee on Military Affairs on S.64*, 66th Cong. 897 (1919).

¹³⁷ Pub. L. No. 66-242, ch. 227, 41 Stat. 790 (1920) (codified as amended at 10 U.S.C. § 821 (2006)).

¹³⁸ An Act to Amend an Act Entitled “An Act for Making Further and More Effectual Provision for the National Defense, and for Other Purposes,” ch. 229, 41 Stat. 792 (1920); *id.* at 793; *id.* at 794; *id.* at 804; *id.* at 810.

¹³⁹ S. REP. NO. 64-130, at 40 (1916).

¹⁴⁰ *Id.*

tory Articles of War and in the Manual for Courts-Martial,¹⁴¹ but military tribunals have sometimes departed from those procedures, even adopting rules after a trial is underway, as with the Nazi saboteur case in 1942.¹⁴²

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.¹⁴³ Congress directed that these regulations “shall, in so far as [the President] shall deem practicable, apply the rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States.”¹⁴⁴ Moreover, “nothing contrary to or inconsistent with these articles shall be so prescribed.”¹⁴⁵ All rules made pursuant to Article 38 were to be placed before Congress each year.¹⁴⁶

Military commissions are also acknowledged at least twice in the United States code, and federal laws recognize that military commissions exist as a general category of military court.¹⁴⁷ Federal laws do not, and cannot, authorize any and every version of a military commission that a President may wish to create. Congress cannot transfer to the President and his aides total discretion over the operation of a military commission, for that would surrender an authority that is placed fundamentally in the legislative branch. There are no grounds to argue that Congress, by enacting Sections 821 and 836, abdicated its constitutional power and changed the nature of representative government.

IV. THE NAZI SABOTEUR CASE

In June 1942, eight German saboteurs reached the United States by submarine with the intent to use explosives against railroads, factories, bridges, and other strategic targets. One of the Germans, George Dasch, turned himself in to the FBI and helped the agency round up the others. Initially the men were to be tried in civil court, but President Franklin D. Roosevelt issued a proclamation to create a military tribunal, which a month later found the eight men guilty.¹⁴⁸ Before the tribunal could issue its verdict, the Germans sought a writ of habeas corpus from the civil courts, but that avenue was blocked when the Supreme Court, in *Quirin*,

¹⁴¹ MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.)

¹⁴² See discussion *infra* Part IV.

¹⁴³ Pub. L. No. 66-242, ch. 227, 41 Stat. 794 (1920).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ 10 U.S.C. §§ 821, 836 (2000).

¹⁴⁸ See LOUIS FISHER, NAZI SABOTEURS ON TRIAL 50-53, 77-80 (2003) [hereinafter FISHER, NAZI SABOTEURS].

upheld the jurisdiction of the tribunal.¹⁴⁹ In June 2004, a plurality of the Supreme Court referred to *Quirin* as “the most apposite precedent that we have on the question of whether citizens may be detained in such circumstances.”¹⁵⁰ To Justices Scalia and Stevens, in a dissent, the Nazi saboteur case “was not this Court’s finest hour.”¹⁵¹ They pointed to a number of problems of extending the logic of *Quirin* to current military tribunals, such as the fundamental difference between the fate of eight saboteurs in *Quirin* who were “admitted enemy invaders”¹⁵² and Yaser Esam Hamdi, who “insists that he is *not* a belligerent.”¹⁵³ For President Bush, relying on *Quirin* as the basis for military tribunals, therefore, seems unintelligible given the Supreme Court’s recent treatment of *Quirin* and the inherent problems woven through the *Quirin* decision itself.

A. *Why a Tribunal?*

There are many problems with *Quirin*, including questions surrounding the Roosevelt administration’s decision to drop its initial preference to try the eight Germans in civil court. Two reasons likely justify the Roosevelt administration’s decision. First, Dasch was told by FBI agents that after pleading guilty in civil court the FBI “would set in motion the wheels for a presidential pardon” as a reward for his assistance in helping the agency find the other seven Germans.¹⁵⁴ The administration changed its mind because it feared that a public trial would reveal that the eight men were captured not as a result of uncanny FBI skills but, rather, because Dasch had turned himself and worked with the FBI in locating the others.¹⁵⁵ The administration did not want to broadcast how easily German U-boats had reached American shores undetected. By concealing Dasch’s assistance, the administration might discourage future attempts at sabotage.

Second, the administration concluded that the maximum penalty for the eight men would be two to three years in prison.¹⁵⁶ Roosevelt, insisting on a death sentence and no interference from federal judges, told Attorney General Francis Biddle: “I won’t give them up . . . I won’t hand them over to any United States marshal armed with a writ of habeas corpus. Understand?”¹⁵⁷

¹⁴⁹ *Ex parte Quirin*, 317 U.S. 1 (1942).

¹⁵⁰ *Hamdi v. Rumsfeld*, 542 U.S. 507, 523 (2004).

¹⁵¹ *Id.* at 569.

¹⁵² *Id.* at 571 (emphasis added by the Justices) (quoting *Ex parte Quirin*, 317 U.S. at 47).

¹⁵³ *Id.* at 572.

¹⁵⁴ FISHER, NAZI SABOTEURS, *supra* note 148, at 45-46.

¹⁵⁵ *Id.* at 46.

¹⁵⁶ See FRANCIS BIDDLE, IN BRIEF AUTHORITY 328 (1962); FISHER, NAZI SABOTEURS, *supra* note 148, at 46-47.

¹⁵⁷ BIDDLE, *supra* note 156, at 331.

Roosevelt created a circular procedure that, if used by another country to try an American citizen, would be condemned by U.S. authorities. In his military order and proclamation, Roosevelt created the military tribunal, appointed seven generals to serve on it (all subordinate to him in his capacity as Commander-in-Chief), appointed two prosecutors (subordinate to him), appointed military officials to serve as defense counsel (subordinate to him), and then, after the tribunal completed its work, compelled submission of the trial record to himself for final review.¹⁵⁸

B. *Absence of Rules*

The military tribunal began its work on July 8, 1942 and continued only until August 1, 1942.¹⁵⁹ There were no rules in place. On the day before the trial began, the tribunal adopted a three-and-a-half page double-spaced statement of rules, dealing primarily with the sessions being closed to the public, the taking of oaths of secrecy, the identification of counsel for the defendants and the prosecution, and the keeping of a record.¹⁶⁰ Only eight lines referred to rules of procedure: disallowing peremptory challenges, allowing one challenge for cause, and concluding language that provided “[i]n general, wherever applicable to a trial by Military Commission, the procedure of the Commission shall be governed by the Articles of War, but the Commission shall determine the application of such Articles to any particular question.”¹⁶¹ The tribunal could, and did, make up its rules as the trial went along. Judge Advocate General Myron C. Cramer, who prosecuted the case with Attorney General Biddle, told the tribunal at one point: “Of course, if the Commission please, the Commission has discretion to do anything it pleases; there is no dispute about that.”¹⁶²

C. *The Supreme Court Enters*

While the military tribunal proceeded, the Supreme Court agreed to hear the case on July 23 and publicly announced on July 27 that oral argument would begin two days later, before there had been any action by the

¹⁵⁸ See Proclamation No. 2561, 3 C.F.R. 309 (1938-1943); Appointment of a Military Commission, 7 Fed. Reg. 5103 (July 7, 1942).

¹⁵⁹ See FISHER, NAZI SABOTEURS, *supra* note 148, at 177-78.

¹⁶⁰ See Frank Ross McCoy, Rules Established by the Military Commission Appointed by Order of the President of July 2, 1942 (July 2, 1942) (unpublished manuscript, on file with the Library of Congress).

¹⁶¹ *Id.* at 3-4.

¹⁶² FISHER, NAZI SABOTEURS, *supra* note 148, at 58 (quoting Transcript of Trial at 991, 1942 *German Saboteur Case*, Court Martial Case Files, CM 334178 (unpublished transcript, on file with the National Archives, College Park, Maryland)).

lower courts.¹⁶³ At 8:00 p.m. on July 28, a federal district court dismissed a motion by defense counsel for a writ of habeas corpus.¹⁶⁴ At noon the next day, the Supreme Court began to hear the case. The briefs filed by opposing parties are dated the same day oral argument commenced.¹⁶⁵ As a result, the Justices were unprepared to analyze complex issues of military law and Articles of War that are rarely placed before the Court. Chief Justice Stone decided to waive the court's rule, which at that time limited each side to one hour. Over a two-day period the Court heard oral argument on the Nazi saboteur case for a remarkable nine hours.¹⁶⁶ The extra time was needed for the prosecution and defense to present their case and for the Justices to get up to speed.

One of the first issues in oral argument was the failure of defense counsel to take the case to the intermediate court, the D.C. Circuit. Justice Felix Frankfurter pressed the point, asking both defense counsel and the government to state on what ground the Court could take the case directly from the district judge. The defense counsel gamely, but futilely, offered a number of losing arguments before suggesting that the Court agree to continue with oral argument with the understanding that defense counsel would take the procedural steps necessary to get the paperwork to the D.C. Circuit.¹⁶⁷

Another dispute was whether some of the Justices should recuse themselves because of personal interests. Justice Frank Murphy had already disqualified himself because of his status as an officer in the military reserves,¹⁶⁸ and Chief Justice Stone's son, Lauson, was part of the defense team. Biddle offered a strained technical argument that Stone could nonetheless sit because his son did not participate in the habeas proceedings.¹⁶⁹ In what seemed a carefully orchestrated move, Stone asked the defense whether they concurred with that argument and they replied: "We do."¹⁷⁰

Furthermore, there were grounds for Frankfurter to recuse himself, too. He frequently stopped by the White House to share his views with President Roosevelt and other top officials. On June 29, two days after the eight Germans had been rounded up, Frankfurter told Secretary of

¹⁶³ Lewis Wood, *Supreme Court is Called in Unprecedented Session to Hear Plea of Nazi Spies*, N.Y. TIMES, July 28, 1942, at 1.

¹⁶⁴ See *Ex parte Quirin*, 47 F. Supp. 431 (D.D.C. 1942).

¹⁶⁵ See Respondent's Answer to Petitions; Brief for the Respondent, *Ex parte Quirin*, 47 F. Supp. 431 (D.D.C. 1942), reprinted in 39 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 395, 463, 495 (1975) [hereinafter LANDMARK BRIEFS].

¹⁶⁶ See FISHER, NAZI SABOTEURS, *supra* note 148, at 95-108.

¹⁶⁷ See LANDMARK BRIEFS, *supra* note 165, at 498-500; FISHER, NAZI SABOTEURS, *supra* note 148, at 96-97.

¹⁶⁸ See FISHER, NAZI SABOTEURS, *supra* note 148, at 95.

¹⁶⁹ LANDMARK BRIEFS, *supra* note 163, at 496-97.

¹⁷⁰ *Id.* at 497.

War Henry Stimson over dinner that the contemplated military tribunal should consist solely of soldiers, with no civilians included.¹⁷¹ Long before the Court had agreed to hear the case, Frankfurter had already staked out a position that favored the government and in fact had met with the Secretary of War to discuss it. Yet Frankfurter participated in the case.

Another question mark was Justice James F. Byrnes, who for months had been serving as a *de facto* member of the Roosevelt administration, working closely with Roosevelt and Biddle on the war effort. Biddle wrote a series of “Dear Jimmie” letters, asking Byrnes for advice on draft executive orders, a draft of the Second War Powers Bill, and requesting him to intervene to get bills out of committee and onto the floor for passage.¹⁷² Despite Byrnes’ close personal involvement with the Roosevelt Administration, he participated in the case as well.

The defense flagged a number of key issues, including the *Ex Post Facto* Clause.¹⁷³ The Constitution expressly prohibits Congress from passing an *ex post facto* law, which is a law that inflicts punishment on a person for an act that was not illegal at the time committed.¹⁷⁴ Under that principle, Congress could not increase the penalty for a crime committed in the past; increased penalties apply only to future transgressions. Yet Roosevelt’s proclamation had been issued after the commission of the acts charged against the eight Germans. The proclamation “is, therefore, *ex post facto* as to them.”¹⁷⁵ Without the proclamation, the maximum penalty for sabotage in time of war could not exceed thirty years, but the Germans had not committed sabotage; rather, they had only planned for it. In the case of espionage, the death penalty was not mandatory. Roosevelt’s proclamation allowed the death penalty if two-thirds of the tribunal agreed, even though Article of War 43 required a unanimous vote for a death sentence.¹⁷⁶ Congress did not have the authority to pass legislation on July 2 that would increase the penalty for acts already committed, and nothing suggests the existence of any constitutional grounds allowing the President to so act.

D. *The Per Curiam*

On July 31, 1942, after two days of oral argument, the Court issued a one-page *per curiam* order dismissing the habeas petitions and upholding the military commission’s jurisdiction.¹⁷⁷ The Court did not issue its full

¹⁷¹ FISHER, NAZI SABOTEURS, *supra* note 148, at 95.

¹⁷² *Id.* at 95-96.

¹⁷³ LANDMARK BRIEFS, *supra* note 165, at 343.

¹⁷⁴ U.S. CONST. art. I, § 9, cl. 2; art. I, § 10, cl. 1; BLACK’S LAW DICTIONARY 620 (8th ed. 2004).

¹⁷⁵ LANDMARK BRIEFS, *supra* note 165, at 343.

¹⁷⁶ FISHER, NAZI SABOTEURS, *supra* note 148, at 53.

¹⁷⁷ *Ex parte Quirin*, 63 S. Ct. 1 (1942) (*per curiam*).

opinion until nearly three months later, on October 29, 1942. By then, six of the eight saboteurs had been executed. Dasch and Peter Burger were given prison sentences because of their cooperation with the government. Chief Justice Stone described writing the opinion as “a mortification of the flesh,” and found only “meager” authority to support the commission’s constitutionality.¹⁷⁸ Stone’s purpose “was not to elucidate the law but, rather, to justify as best he could a dubious decision” after the fact.¹⁷⁹

Chief Justice Stone and the other Justices did everything they could to secure a unanimous opinion. When it appeared that the Court might fragment with separate concurrences or statements, Justice Frankfurter circulated an impassioned plea, entitled “F.F.’s Soliloquy,” in which he called the saboteurs “damned scoundrels” and cautioned his colleagues that “we [have] enough of a job trying to lick the Japs and the Nazis” without the Supreme Court “stirring up a nice row” with “abstract constitutional discussions.”¹⁸⁰ In this soliloquy, written after six of the Germans had been electrocuted, Frankfurter called them “low-down, ordinary, enemy spies” and talked about their bodies “rotting in line.”¹⁸¹ One scholar described Frankfurter’s soliloquy as a “judge openly hostile to the accused and manifestly unwilling to afford them procedural safeguards.”¹⁸²

While Stone was drafting the full opinion, however, Frankfurter concluded that “there can be no doubt that the President did *not* follow” Articles of War 46 through 53.¹⁸³ Frankfurter stated that he had “not a shadow of doubt” that Roosevelt “did not comply with Article 46 *et seq.*”¹⁸⁴ Stone had to stay on the alert to keep memos of that quality from being published.

E. Assessments

Justice Frankfurter later asked Frederick Bernays Wiener, his former student and an acknowledged expert on military law, for his evaluation of the Court’s work. Wiener told him that the “[w]eaknesses in the decision flowed ‘in large measure’ from the [Roosevelt] Administration’s disregard for ‘almost every precedent in the books’ when it established the

¹⁷⁸ David J. Danelski, *The Saboteurs’ Case*, 1 J. SUP. CT. HIST. 61, 72-73 (1996) (citation omitted).

¹⁷⁹ Michal R. Belknap, *The Supreme Court Goes to War: The Meaning and Implications of the Nazi Saboteur Case*, 89 MIL. L. REV. 59, 87 (1980).

¹⁸⁰ FISHER, NAZI SABOTEURS, *supra* note 148, at 119-121.

¹⁸¹ *Id.* at 118-20.

¹⁸² Michal Belknap, *Frankfurter and the Nazi Saboteurs*, in SUPREME COURT HISTORICAL SOCIETY YEARBOOK 66, 66 (1982).

¹⁸³ FISHER, NAZI SABOTEURS, *supra* note 148, at 117 (emphasis in original).

¹⁸⁴ *Id.*

military tribunal.”¹⁸⁵ Wiener emphasized that court-martial procedures had “almost uniformly been applied to military commissions” and that it was “too plain for argument” that the President could not unilaterally waive or override the required review by the Judge Advocate General’s office simply by establishing a military commission.¹⁸⁶ Wiener said that the only precedent for using the Judge Advocate General of the Army as prosecutor—the trial of the Lincoln conspirators—was one which “no self-respecting military lawyer will look straight in the eye.”¹⁸⁷

When two other German agents were captured after entering the United States some two years later, Secretary Stimson cautioned Roosevelt that replicating the procedures used for the *Quirin* saboteurs would lead to charges in Germany that “innocent Germans were being tried and condemned by an extraordinary proceeding” and would “likely . . . lead to German maltreatment of American prisoners of war in their hands.”¹⁸⁸ Taking Stimson’s advice, Roosevelt conformed the military commission more closely with courts-martial, including restoring judge advocate review under the Articles of War.¹⁸⁹ Thus, the 1942 tribunal upheld in *Quirin* was repudiated less than three years later by the Roosevelt Administration.

Justice Frankfurter later acknowledged that *Quirin* “was not a happy precedent” for issuing a short per curiam followed by legal reasoning months later.¹⁹⁰ In an interview on June 9, 1962, Justice Douglas offered a similar assessment: “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.”¹⁹¹

Scholars have been quite critical of *Quirin*. Alpheus Thomas Mason, in his book on Chief Justice Stone and in an article in a law review, explained Stone’s attempt to draft an opinion that would do the least damage to the judiciary. The Court could do little other than uphold the jurisdiction of the military tribunal, being “somewhat in the position of a private on sentry duty accosting a commanding general without his

¹⁸⁵ *Id.* at 129 (citing “Observations of *Ex parte Quirin*,” signed “F.B.W.,” at 1, Frankfurter Papers).

¹⁸⁶ *Id.* at 130.

¹⁸⁷ *Id.* at 131.

¹⁸⁸ *Id.* at 140.

¹⁸⁹ Military Order of January 11, 1945, 3 C.F.R. 1074 (“The record of the trial, including any judgment or sentence, shall be promptly reviewed [by the Judge Advocate General’s office] under the procedures established in Article 50½ of the Articles of War.”).

¹⁹⁰ FISHER, NAZI SABOTEURS, *supra* note 148, at 134.

¹⁹¹ *Id.*

pass.”¹⁹² Stone, Mason said, was well aware that the judiciary was “in danger of becoming part of an executive juggernaut.”¹⁹³

To Michal Belknap, Stone went to “such lengths to justify Roosevelt’s proclamation” that he preserved the “form” of judicial review while “gutt[ing] it of substance.”¹⁹⁴ David J. Danelski called the full opinion in *Quirin* “a rush to judgment, an agonizing effort to justify a *fait accompli*.”¹⁹⁵ The opinion represented a victory for the executive branch, but for the Court “an institutional defeat.”¹⁹⁶ 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.”¹⁹⁷ Clearly, common perception held that *Quirin* was a contrived decision without anchoring itself in any legal precedent.

V. OTHER WORLD WAR II TRIALS

World War II marked other failures on the part of Congress and the judiciary to check executive misuse of military tribunals. Some district and circuit courts had the courage to assert their independence and formulate principled objections to military rule, but the Supreme Court regularly overturned those efforts until the war was over.

A. *Martial Law in Hawaii*

In Hawaii, after the Pearl Harbor attack, Governor Joseph B. Poindexter chose not to utilize the emergency powers that were authorized to him under the Hawaii Defense Act and instead issued a proclamation that transferred all governmental functions (including judicial) to the Commanding General of the Hawaiian Department.¹⁹⁸ He called upon the Commanding General, Lt. Gen. Walter C. Short, to suspend the writ of habeas corpus.¹⁹⁹ Short created two forms of military tribunal to try any case involving an offense against federal law, Hawaiian law and “the rules, regulations, orders or policies of the military authorities.”²⁰⁰ These military courts included provost courts, which were authorized to impose

¹⁹² Alpheus Thomas Mason, *Inter Arma Silent Leges: Chief Justice Stone’s Views*, 69 HARV. L. REV. 806, 830 (1956).

¹⁹³ *Id.* at 831. These views also appear in ALPHEUS THOMAS MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 665-66 (The Viking Press 1956).

¹⁹⁴ Belknap, *The Supreme Court Goes to War: The Meaning and Implications of the Nazi Saboteur Case*, *supra* note 179, at 83.

¹⁹⁵ Danelski, *supra* note 178, at 61.

¹⁹⁶ *Id.* at 80.

¹⁹⁷ *Id.*

¹⁹⁸ FISHER, MILITARY TRIBUNALS, *supra* note 11, at 130.

¹⁹⁹ J. Garner Anthony, *Martial Law in Hawaii*, 30 CAL. L. REV. 371, 371-72, 392-93 (1942).

²⁰⁰ FISHER, MILITARY TRIBUNALS, *supra* note 11, at 130-131.

fining 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.²⁰¹ Martial law under General Short covered 159,000 civilians of Japanese ancestry as well as the territory's entire population of 465,000.²⁰²

When some U.S. citizens were kept in prison without ever being charged, federal courts ruled that judges should not interfere with military decisions.²⁰³ A dissenting judge in the Ninth Circuit warned that without judicial and legislative checks "it would be simple for a tyrannical executive to declare martial law, and then under a pretext of necessity, take in custody, the members of Congress, as well as the courts, thus effectually abolishing the Constitution."²⁰⁴ Ingram M. Stainback, who replaced Poindexter as Governor in August 1942, successfully shifted political power from martial law to civilian authority,²⁰⁵ and District Judge Metzger issued some gutsy decisions to challenge military authority.²⁰⁶ Still, military courts continued to try U.S. citizens.²⁰⁷ Not until the war was over did the Supreme Court decide that martial law in Hawaii had run its course and that U.S. citizens were entitled to the protections of civil courts.²⁰⁸

B. *General Yamashita*

Perhaps one of the worst examples of a military tribunal is the trial of General Tomoyuki Yamashita. In 1945, just three years after suffering defeat in the Philippines,²⁰⁹ General Douglas MacArthur was in a position to determine the fate of General Yamashita. As commander of the Far Eastern theater, 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.²¹⁰ Yet MacArthur retained control over the all-important power to decide the charges against the accused and the rules that would govern tribunal procedures.²¹¹ After surrendering on September 3, 1945, Yamashita was

²⁰¹ *Id.* at 393-94.

²⁰² Harry N. Scheiber & Jane L. Scheiber, *Constitutional Liberty in World War II: Army Rule and Martial Law in Hawaii, 1941-46*, 3 W. LEGAL HIST. 341, 342 (1990).

²⁰³ *See Ex parte Zimmerman*, 132 F.2d 442, 444 (9th Cir. 1942).

²⁰⁴ *Id.* at 450.

²⁰⁵ *See FISHER, MILITARY TRIBUNALS*, *supra* note 11, at 133-35.

²⁰⁶ *Id.* at 135-38.

²⁰⁷ *See id.* at 136-38.

²⁰⁸ *See Duncan v. Kahanamoku*, 327 U.S. 304 (1946); *FISHER, MILITARY TRIBUNALS*, *supra* note 11, at 138-39.

²⁰⁹ *See RICHARD L. LAEL, THE YAMASHITA PRECEDENT: WAR CRIMES AND COMMAND RESPONSIBILITY* 26 (Scholarly Res. Inc. 1982).

²¹⁰ *Id.* at 71, 73.

²¹¹ *See id.* at 73.

subsequently charged as a war criminal and accused of failing, as commanding general of the Japanese Fourteenth Army Group in the Philippines, to prevent his troops from engaging in atrocities against the civilian population and prisoners of war.²¹² There was no evidence that Yamashita knew of the atrocities or had in any way directed them, and even MacArthur's aides understood that there was no precedent for charging a field commander "with the negligence of duty in controlling his troops."²¹³

In addition to sixty-four individual charges, the comprehensive charge claimed that between October 9, 1944 and September 2, 1945, Yamashita "unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes" against Americans and allies (particularly Filipinos), all of which constituted violations of the "laws of war."²¹⁴ None of the charges established a direct link between Yamashita and the underlying criminal acts.²¹⁵ Shortly before the trial began, the prosecution added fifty-nine other charges.²¹⁶

The six U.S. army officers appointed to defend Yamashita had only three weeks to prepare for trial, locate witnesses, and conduct research on all 123 charges.²¹⁷ Five American generals sat on the tribunal, none of them lawyers.²¹⁸ One of the generals was designated a "law member" even though he was not a lawyer.²¹⁹ Only one of the generals had extensive combat command experience and an understanding of the capacity of a commander in wartime to control troops.²²⁰

In response to defense counsel arguing that Yamashita had no knowledge of the atrocities or any part in authorizing or encouraging them, 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 simply because he took affirmative action not to know."²²¹ Two prosecution witnesses attempted to link Yamashita to the atrocities; however, the hearsay rule and a rebuttal witness rendered the prosecution's witness ineffective.²²² Both of the witnesses for the prosecution had much to gain personally and financially by cooperating with U.S. officials.²²³

²¹² FISHER, *MILITARY TRIBUNALS*, *supra* note 11, at 145.

²¹³ LAEL, *supra* note 209 at 69.

²¹⁴ George F. Guy, *The Defense of Yamashita*, 4 WYO. L. J. 153, 156 (1950).

²¹⁵ LAEL, *supra* note 209, at 80-81.

²¹⁶ *Id.* at 81-82.

²¹⁷ *See id.* at 81.

²¹⁸ J. Gordon Feldhaus, *The Trial of Yamashita*, 15 S. D. B.J. 181, 185 (1946).

²¹⁹ Guy, *supra* note 214, at 161.

²²⁰ Stephen B. Ives, Jr., *Vengeance Did Not Deliver Justice*, WASH. POST, Dec. 30, 2001, at B2; LAEL, *supra* note 209, at 88.

²²¹ LAEL, *supra* note 209, at 83.

²²² FISHER, *MILITARY TRIBUNALS*, *supra* note 11, at 146.

²²³ *See* LAEL, *supra* note 209 at 84-85.

On December 7, 1945, the tribunal found Yamashita guilty and sentenced him to death by hanging.²²⁴ Twelve international correspondents covering the trial voted unanimously amongst themselves that Yamashita should have been acquitted.²²⁵ After defense counsel filed a habeas petition to the Supreme Court, the Justices split six-to-two in upholding the tribunal's actions.²²⁶ Writing for the Court, Chief Justice Stone explained that no attempt was made to appraise or weigh the evidence introduced at trial, concluding that such matters were wholly within the competence of the tribunal.²²⁷ 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.²²⁸ 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."²²⁹ That standard language, however, does not mean that a commander is liable for criminal actions by subordinates. Otherwise, General MacArthur's aides would not have concluded that there was no precedent for charging a field commander with negligent actions by subordinate troops.

Justices Murphy and Rutledge issued lengthy and biting 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."²³⁰ The Due Process Clause, Murphy pointed out, applies to "any person" who is accused of a federal crime.²³¹ 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."²³²

To Murphy, 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."²³³ Although "brutal atrocities" had been inflicted on the Filipino population by Japanese soldiers under Yamashita's command,²³⁴ there was no evidence that he knew of the atrocities or in any way ordered them. In fact, U.S. forces had done everything possible to disrupt his control over Japanese troops. Murphy objected that to "use the very inefficiency and disorganization created by

²²⁴ FISHER, *MILITARY TRIBUNALS*, *supra* note 11, at 146.

²²⁵ PHILIP R. PICCIGALLO, *THE JAPANESE ON TRIAL* 57 (1979).

²²⁶ *In re Yamashita*, 327 U.S. 1 (1946).

²²⁷ *Id.* at 17.

²²⁸ *Id.* at 15-16.

²²⁹ *Id.* at 15-16 (quoting 36 Stat. 2295 (1907)).

²³⁰ *In re Yamashita*, 327 U.S. at 40.

²³¹ *Id.* at 26.

²³² *Id.*

²³³ *Id.* at 27-28.

²³⁴ *Id.* at 29.

the victorious forces as the primary basis for condemning officers of the defeated armies bears no resemblance to justice or to military reality.”²³⁵

Justice Rutledge’s dissent concluded that the proceedings and rules of evidence of the Yamashita tribunal violated two Articles of War (25 and 38). Although the majority held that those Articles were not applicable to the proceeding against Yamashita, Rutledge insisted that both Articles applied to military commissions and tribunals.²³⁶ Article 25 described the process of taking depositions and specified that they may be read in evidence before any military court or tribunals “in any case not capital.”²³⁷ 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 to the rules of evidence generally recognized in criminal trials in federal court.²³⁸ Article 38 closed with this limitation: “Nothing contrary to or inconsistent with these articles shall be so prescribed.”²³⁹

Rutledge charged that it was not in the American tradition “to be charged with crime which is defined after the 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.”²⁴⁰ In agreeing that in *Quirin* the Court also decided that it would not review the evidence, “it was not there or elsewhere determined that it could not ascertain whether conviction is founded upon evidence expressly excluded by Congress or treaty; nor does the Court purport to do so now.”²⁴¹ A separate section of Rutledge’s dissent concluded that Yamashita’s trial conflicted with the Geneva Convention of 1929.²⁴² In a private letter, Rutledge said that the Yamashita case “will outrank Dred Scott in the annals of the Court.”²⁴³

On February 23, 1946, in a prison camp near Manila, Yamashita was hanged.²⁴⁴ A. Frank Reel, a member of his defense team, wrote critically about the conduct of the trial. Describing the treatment of Yamashita as “unjust, hypocritical, and vindictive,” he advised that the United States “must learn that victory without justice is a dead thing, that humanity cannot live without charity,” and that “as we judge, so will we be judged; our own rights and privileges are those we grant to the lowliest and most

²³⁵ *Id.* at 35.

²³⁶ *Id.* at 61.

²³⁷ *Id.* at 62.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.* at 43.

²⁴¹ *Id.* at 47.

²⁴² *See id.* at 72-78.

²⁴³ JOHN P. FRANK, *THE MARBLE PALACE: THE SUPREME COURT IN AMERICAN LIFE* 137 (Bozoi Books 1972) (1958).

²⁴⁴ FISHER, *MILITARY TRIBUNALS*, *supra* note 11, at 150.

despised of culprits.”²⁴⁵ Reel 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*.”²⁴⁶

C. Vietnam Standards

Atrocities committed by U.S. forces in Vietnam raised the question whether American generals and commanders would be held responsible under the same test that had been applied to Yamashita. They were governed by a more lenient standard. As explained below, instead of the guideline that a commander “should have known” or “must have known,” the test now shifted to whether an American officer 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 The President of the United States is Commander in Chief of its military forces. Criminal acts submitted by those forces cannot in themselves be charged to him on the theory of subordination. The same is true of other high commanders in the chain of command.”²⁴⁷

The court-martial of Captain Ernest L. Medina in 1971 attempted to hold him responsible for acts of force and violence during his interrogation of prisoners of war in Vietnam and for his inability to intervene when subordinates killed noncombatants.²⁴⁸ The instructions issued by the military judge in the case differed strikingly from the principle of command responsibility followed in the Yamashita case. 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.”²⁴⁹ The different treatment accorded to Yamashita and Medina reveals an

²⁴⁵ A. FRANK REEL, *THE CASE OF GENERAL YAMASHITA* 247 (1949).

²⁴⁶ *Id.* at 245.

²⁴⁷ 2 *THE LAW OF WAR: A DOCUMENTARY HISTORY 1450* (Leon Friedman ed., Random House 1972).

²⁴⁸ FISHER, *MILITARY TRIBUNALS*, *supra* note 11, at 152-153.

²⁴⁹ 2 *THE LAW OF WAR*, *supra* note 247 at 1732 (emphasis in original). For comments on the military judge in the Medina case, see Kenneth A. Howard, *Command Responsibility for War Crimes*, 21 J. PUB. L. 7 (1972). See also Franklin A. Hart, *Yamashita, Nuremberg and Vietnam: Command Responsibility Reappraised*, 25 NAVAL WAR COLL. REV. 19 (1972); William H. Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1 (1973); William V. O'Brien, *The Law of War, Command Responsibility and Vietnam*, 60 GEO. L.J. 605 (1972); Ilias Bantekas, *The Contemporary Law of Superior Responsibility*, 93 AM. J. INT'L L. 573 (1999).

inherent problem that accompanies all military tribunals: the lack of a fixed and objective standard. Harsh standards are applied to the enemy, more lenient ones for U.S. troops. The opportunity for bias and subjectivity undercuts the principles supposedly implicit in the "law of war."

VI. IMPARTIALITY

In their article, David Rivkin and Lee Casey conclude that the record of military commissions compares well to the conduct of other military trials: "Military commissions are, in fact, no more or less partial than any other judicial body in the military justice system."²⁵⁰ Yet the record of military commissions has been plagued by problems of impartiality, allowing commanders to use the system to inflict injury and even death on individuals personally disfavored and singled out for punishment. The early military courts displayed this misuse, forcing Congress to intervene to correct it. In addition to bringing charges against subordinates, commanding officers also appeared before the court-martial as the principal prosecution witness and later supported the proceedings that decided on a reprimand.²⁵¹ Congressional debate in 1830 pointed to the problem of the same general or colonel who ordered a court-martial also acting as "the accuser and prosecutor, when it was obviously inconsistent with the common principles of justice, that the members of a court who are to sit in judgment upon the accused should be detailed by an individual interested in the event of the trial, and who, under the influence of that feeling, might select officers hostile to the party accused, or peculiarly attached to himself."²⁵²

Congress enacted legislation to provide that whenever an 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."²⁵³ This statute remedied the conflict of interest problem within the military, but the conflict remained with military tribunals. Partiality was evident in many of the Civil War tribunals, including those governing the Dakota trials, the trial of Henry Wirz, and the tribunal established for the Lincoln conspirators.²⁵⁴

In the Nazi saboteur case of 1942, President Franklin D. Roosevelt was determined to subject the eight Germans to the death penalty rather than the two or three years available through criminal statutes. He created the tribunal, appointed the generals who served on the tribunal, appointed the prosecutors and the defense counsel, all of whom were subordinate to

²⁵⁰ David B. Rivkin, Jr. & Lee A. Casey, *The Use of Military Commissions in the War on Terror*, 24 B.U. INT'L L.J. 123, 132 (2006).

²⁵¹ FISHER, MILITARY TRIBUNALS, *supra* note 11, at 23.

²⁵² 6 REG. DEB. 575 (1830).

²⁵³ 4 Stat. 417 (1830).

²⁵⁴ *See supra* Part II.B-C.

him in his capacity as Commander-in-Chief.²⁵⁵ The tribunal found all eight guilty and dutifully recommended the death penalty.²⁵⁶ The court transcript then went to Roosevelt as the final reviewing authority.²⁵⁷ He gave two of the men prison sentences and ordered the others executed.²⁵⁸ They were electrocuted on August 8, 1942.²⁵⁹ The procedure was so fraught with prejudice that the Roosevelt Administration abandoned it when trying two more men who came from Germany in November 1944.²⁶⁰

With regard to the execution of General Yamashita, General Douglas MacArthur played a pivotal role. He had been defeated by the Japanese in the Philippines in 1942. With the war over, MacArthur was in a position as commander of the Far Eastern theater to direct the prosecution of Yamashita. He directed Lt. Gen. Wilhelm D. Styer to establish the tribunal, and it was Styer who appointed the prosecutors, defense counsel, and members of the tribunal.²⁶¹ MacArthur retained the ability to decide both the charges against the accused and the rules that governed the tribunal procedures.²⁶² The stringent standards applied to Yamashita were relaxed years later when U.S. officers were charged with allowing atrocities by American soldiers who served under them during the Vietnam War.²⁶³ This record suggests that military tribunals have historically lacked the impartiality that is the essence of a fair trial.

VII. THE *HAMDAN* DECISION

Writing for the Supreme Court in *Hamdan v. Rumsfeld*,²⁶⁴ Justice Stevens brought welcome clarity to a number of fundamental points. First, military tribunals require legislative action by Congress under its Article I powers. Tribunals may not be legitimately created under the President's Article II powers or justified elsewhere under the arsenal of "inherent" executive authorities. Military tribunals, furthermore, must follow the detailed procedures in the Uniform Code of Military Justice (UCMJ), enacted by Congress in 1950.

The Court directed the administration to go to Congress to obtain statutory authority for the procedures to be applied to detainees. Although the Court assumed that the Authorization for the Use of Military Force (AUMF) "activated the President's war powers" and that those powers

²⁵⁵ See FISHER, NAZI SABOTEURS, *supra* note 148, at 50-53.

²⁵⁶ *Id.* at 77.

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 78.

²⁵⁹ *Id.* at 78-79.

²⁶⁰ See *supra* Part IV; FISHER, NAZI SABOTEURS, *supra* note 148, at 138-44.

²⁶¹ FISHER, MILITARY TRIBUNALS, *supra* note 11, at 144.

²⁶² *Id.*

²⁶³ See *supra* Part V.B.

²⁶⁴ 126 S. Ct. 2749 (2006).

“include [the] authority to convene military commissions in appropriate circumstances,” it found nothing in the text or legislative history of the AUMF “even hinting that Congress intended to expand or alter the authorization set forth in UCMJ Art. 21.”²⁶⁵ Article 21 provides that the jurisdiction of courts-martial is not exclusive. Nothing in the U.S. Code conferring jurisdiction on courts-martial was to 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 tried by such military commissions, provost courts, or other military tribunals.”²⁶⁶ Part of the congressional purpose in legislating in this area is to avoid the “risk [of] concentrating in military hands a degree of adjudicative and punitive power in excess of that contemplated either by statute or by the Constitution.”²⁶⁷

Second, the Court was troubled by a number of provisions in the commission procedures adopted by the administration. The accused and his civilian counsel “may be excluded from, and precluded from ever learning what evidence was presented during, any part of the proceeding that either the Appointing Authority or the presiding officer decides to ‘close.’”²⁶⁸ Testimonial hearsay and evidence obtained through coercion is “fully admissible,” and neither “live testimony nor witnesses’ written statements need be sworn.”²⁶⁹ A presiding officer’s determination that evidence “would not have probative value to a reasonable person may be overridden by a majority of the other commission members.”²⁷⁰

Third, Salim Ahmed Hamdan objected that the procedures adopted by the administration, admittedly different from those governing courts-martial, “renders the commission illegal.”²⁷¹ He complained that “he will be, and *indeed already has been*, excluded from his own trial.”²⁷² Although military commissions are specifically identified in Article 21, Justice Stevens pointed out that “the procedures governing trials by military commission historically have been the same as those governing courts-martial.”²⁷³ The administration was limited entirely by court-martial procedures, but “any departure must be tailored to the exigency that necessitates it.”²⁷⁴

Article 36 of the UCMJ provides that the procedures for courts-martial, courts of inquiry, military commissions, and other military tribunals

²⁶⁵ *Id.* at 2755.

²⁶⁶ *Id.* at 2774.

²⁶⁷ *Id.* at 2780.

²⁶⁸ *Id.* at 2786.

²⁶⁹ *Id.* at 2786-87.

²⁷⁰ *Id.* at 2787.

²⁷¹ *Id.*

²⁷² *Id.* at 2788 (emphasis in original).

²⁷³ *Id.*

²⁷⁴ *Id.* at 2790.

“may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.”²⁷⁵ All rules and regulations made under Article 36 “shall be uniform insofar as practicable and shall be reported to Congress.”²⁷⁶ Justice Stevens concluded that because of the “practicability” standard placed upon the President, the administration’s proposed list of rules for the commissions “is insufficient to justify variances from the procedures governing courts-martial.”²⁷⁷ The rules set forth in the *Manual for Courts-Martial* “must apply to military commissions unless impracticable.”²⁷⁸ To Justice Stevens, nothing in the record “demonstrates that it would be impracticable to apply court-martial rules in this case.”²⁷⁹

By requiring congressional action, the Court in *Hamdan* underscores the unacceptable risk of having all three powers—executive, legislative, and judicial—concentrated in a single branch free to operate under vague emergency powers. Such systems cannot be reconciled with bedrock principles of the rule of law. The procedures established by the Bush administration invited arbitrary, unchecked power. The Court clearly repudiated the idea that military commissions are no more or less partial than courts-martial, but the latter functions on the basis of statutory authority and well-established procedures that have been in place since 1950. The commissions established by the Bush military order of November 13, 2001 functioned without statutory authority and condoned trial procedures that have been transient and ever-changing.

Under these conditions, the Court found that the Bush military commissions violated the Geneva Conventions, particularly Common Article 3, which prohibits “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”²⁸⁰ The phrases “regularly constituted court” and guarantees recognized by “civilized peoples” obviously are not meant to be precise standards. However, Justice Stevens concluded that “regularly constituted” tribunals consist of “ordinary military courts” but not necessarily “all special tribunals.”²⁸¹ Unless the administration obtained from Congress statutory authority and explained the practical

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Id.* at 2791.

²⁷⁸ *Id.*

²⁷⁹ *Id.* at 2792.

²⁸⁰ *Id.* at 2795.

²⁸¹ *Id.* at 2796-97.

need to deviate from court-martial practice, military commissions fall under the prohibited category of “all special tribunals.”²⁸²

Initially, the Bush administration responded to the Court’s decision by insisting that the President possesses, under Article II, inherent and plenary power to create military commissions. Senator Bill Frist announced the Bush administration’s position when he introduced his Senate bill containing the following language: “The President’s authority to convene military commissions arises from the Constitution’s vesting in the President of the executive power and the power of Commander in Chief of the Armed Forces.”²⁸³ Evidently that power does not exist. If it did, the administration would have prevailed in *Hamdan* and there would have been no need for President Bush to come to Congress for statutory authority. Senator Frist’s proposed language was eventually stripped from the bill that became public law.

Most of the conflicts between the administration and Congress in drafting the bill concerned interrogation techniques, a detainee’s right to confront evidence, and the application of the Geneva Conventions. In the early deliberations, it appeared that influential Republicans in the Senate would force the Bush Administration to retreat from its positions. This phase of executive-legislative negotiations is captured in numerous articles, many of which suggest a divided Republican party.²⁸⁴ As negotiations continued, lawmakers largely backed away from the confrontation and the administration won many of the key issues.²⁸⁵ *Hamdan* announced the important principle that procedures and rules for military commissions must be established by statute, but members of Congress displayed little interest or confidence in their institutional duty to use Article I authority to place limits on presidential power.

VIII. CONCLUSIONS

Unlike earlier periods when the legislative and judicial branches played a more active role in policing the operation of military tribunals, there is now a pattern of Presidents unilaterally creating tribunals, staffing them,

²⁸² *Id.*

²⁸³ 152 CONG. REC. S9113 (daily ed. Sept. 7, 2006).

²⁸⁴ John M. Donnelly, *Detainee Treatment Fractures GOP*, CONGRESSIONAL QUARTERLY WEEKLY REPORT, Sept. 18, 2006, at 2458; John M. Donnelly, *Bush Yields on Detainee Accord*, CONGRESSIONAL QUARTERLY WEEKLY REPORT, Sept. 25, 2006, at 2554; David Nather, *Where the Moral High Road Leads: A Trio of GOP Lawmakers Oppose Their President on Detainee Treatment and Still Gain Political Capital*, CONGRESSIONAL QUARTERLY WEEKLY REPORT, Sept. 25, 2006, at 2518.

²⁸⁵ Martin Kady II, *Congress Clears Detainee Bill: Critics Question Constitutionality: Habeas Corpus Rights are Denied; Coerced Confessions, Hearsay Evidence are Allowed*, CONGRESSIONAL QUARTERLY WEEKLY REPORT, Oct. 2, 2006, at 2624. See also Editorial, *Profiles in Cowardice: On Prisoner Abuse and Detention, President Bush Finds Enablers in Both Parties*, WASH. POST, Oct. 1, 2006, at B6.

and establishing rules and procedure to guide them, all with little or minimal involvement of the other two branches. In this area there has been a transformation from a republican form of government, as created by the framers, to one characterized either by claims of inherent presidential powers or even a revival of the royal prerogative.

In a system of unilateral steps by the President to create military tribunals, the President and his assistants make law, handle prosecution, and then render final judgments. “Crimes” relating to the law of war come not from the legislative branch, enacted by statute, but from executive interpretations of international law. It has always been the expectation and statutory policy that the rules and procedures governing military tribunals must conform, in general, to the rules and procedures for courts-martial. It was a miscalculation of the Bush administration in 2001 to accept the Roosevelt model of 1942 as an adequate guide for tribunals. The Roosevelt Administration rejected the 1942 model less than three years later, and Justices of the Supreme Court regretted the manner in which *Quirin* was decided. The Nazi saboteur case is a precedent, but not one worth repeating.

The Bush administration after 9/11 has done much to impair the rights of defendants, moving first against non-citizens with the military order of November 13, 2001, and later claiming the inherent right to hold U.S. citizens as “enemy combatants” and detain them indefinitely without being charged, given counsel, or tried.²⁸⁶ Even those elementary rights and procedures were accorded the Nazi saboteurs. The framers rejected political models that concentrated power in a single branch, especially considering matters of war. They relied on a system of checks and balances, separation of powers, judicial review, and republican principles. Without honoring and respecting those values at home, American democracy cannot be credibly exported abroad.

The Supreme Court has repeatedly expressed concern about the concentration of executive power over trials. 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.”²⁸⁷ In 1955, Justice Black wrote for the Court: “We find nothing in the history of 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.”²⁸⁸ Two years later, again writing for the majority, Black warned that if the President “can provide rules of substantive law as well as procedure, then he and his military subordinates exercise legislative,

²⁸⁶ See generally FISHER, *MILITARY TRIBUNALS*, *supra* note 11, at 168-252.

²⁸⁷ *Duncan v. Kahanamoku*, 327 U.S. 304, 322 (1946).

²⁸⁸ *Toth v. Quarles*, 350 U.S. 11, 17 (1955).

executive and judicial powers with respect to those subject to military trials.”²⁸⁹ Such a concentration of power, he warned, runs counter to the core constitutional principle of separation of powers.

Other federal judges have sent similar messages. A federal district judge in 1979 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 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.”²⁹⁰ In the post-9/11 climate, it is widely argued that citizens need to surrender certain rights and liberties to the executive branch in return for greater security. That is not a formula for constitutional or democratic government. Rights and liberties, the framers understood, depend on structural checks and balances, not the concentration of executive power. Other countries, to their regret, have placed their trust in wise and prudent executives. Such a step is neither wise nor prudent.

Justice Robert Jackson is cited widely for setting forth three categories of presidential power in his concurrence in the Steel Seizure Case of 1952.²⁹¹ Scholars (and often federal judges) seem to believe that if one can locate a disputed action among one of those categories, the constitutional issue will be answered. But Jackson clearly offered his analysis as “a somewhat over-simplified grouping of practical situations in which a President may doubt, or other may challenge, his powers . . .”²⁹² Jackson intended his framework to be a rough cut, a starting point. His more enduring constitutional value comes at the end of the concurrence: “With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations.”²⁹³

²⁸⁹ Reid v. Covert, 354 U.S. 1, 38-39 (1957).

²⁹⁰ United States v. Tiede, 86 F.R.D. 227, 243 (U.S. Ct. Berlin 1979). *See generally* HERBERT J. STERN, JUDGMENT IN BERLIN (1984).

²⁹¹ *See* Youngstown Co. v. Sawyer, 343 U.S. 579, 635-38 (1952).

²⁹² *Id.* at 635.

²⁹³ *Id.* at 655.

