

Insert before section C on p. 225:

Note: Military Tribunals from the Civil War to 9/11

On November 13, 2001, President Bush issued an executive order authorizing the creation of military tribunals to try persons suspected of terrorist activities arising out of the September 11th attacks on the United States. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001).

The Executive Order directs the Secretary of Defense to create the tribunals, which may sit at any time and place, including the United States-- and to take into custody anyone who is subject to them. A person is subject to a military tribunal if the President determines that there is reason to believe that the individual is or was a member of the al Qaeda terrorist organization, has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or has harbored such a person. The Order does not define the term acts of international terrorism.

The Executive Order also directs that the Secretary of Defense establish procedures for the tribunals. At a minimum these require that convictions and sentencing be based on a two-thirds vote of the members of the commission present at the time of voting. A majority of the commissioners appointed to the case must be present in order to vote. (Subsequent defense department regulations issued in March 2002 made clear that a unanimous verdict would be required for a death sentence but not for non-capital offenses.) Traditional rules of criminal procedure and evidence that apply in ordinary criminal courts are relaxed and evidence that would ordinarily be excluded from a criminal trial (or a military court-martial) may be admitted as long as it would have probative value to a reasonable person. There is no requirement of grand jury presentment or indictment. The tribunals also employ as triers of both fact and law military officers who are neither Article III judges nor members of a traditional jury. Finally, the military tribunals may be held in secret.

The new military tribunals shall have exclusive jurisdiction with respect to offenses committed by individual subject to them, and the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal. Instead, the President reserves for himself the right to final review of the trial, conviction and sentence of the military tribunal. (Regulations issued in March 2002 also specify that appeals from a verdict may be made to military officers, but not to a court).

Finally, and perhaps equally important, there is no requirement that persons detained under authority of the Executive Order ever be brought to trial. For example, many of the 300 or so persons who were detained at the U.S. Naval Base at Guantanamo Bay, Cuba, after the government's military operations in Afghanistan may never be tried by military commissions, but will be held indefinitely pending the government's decision about what to do with them.

Although the Executive Order by its terms applies only to non-citizens, the government has also detained an American citizen, Jose Padilla, (who converted to Islam and took the name

Abdullah al-Muhajir) and held him in a military prison on the theory that as an enemy combatant, it may hold him without trial throughout the course of the War on Terrorism.

In deciding whether the use of military tribunals and indefinite detentions by military officials are constitutional, an important preliminary question is whether tribunals or detentions would be constitutional if Congress authorizes them. A second is whether the President may act unilaterally without some prior authorization by Congress. A third, and related question is whether the President's order effectively suspends the writ of habeas corpus with respect to individuals subject to trial by military commissions, whether they are tried or merely detained indefinitely, and if so whether the suspension of the writ is authorized by the Constitution.

In *Ex parte Milligan*, 71 U.S. (1 Wall.) 2 (1866), a group of men were arrested in Indiana and tried before a military commission for conspiracy against the United States. The military authorities accused them of planning an armed uprising to seize Union weapons, liberate Confederate prisoners of war, and kidnap the Governor of Indiana. Milligan brought a habeas petition in federal court challenging the authority of the military commission, which made its way to the Supreme Court. The Court, in an opinion by Justice Davis, held that the military commission lacked jurisdiction to try Milligan:

No graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole people; for it is the birthright of every American citizen when charged with crime, to be tried and punished according to law. . . . The decision of this question does not depend on argument or judicial precedents, numerous and highly illustrative as they are. These precedents inform us of the extent of the struggle to preserve liberty and to relieve those in civil life from military trials. The founders of our government were familiar with the history of that struggle; and secured in a written constitution every right which the people had wrested from power during a contest of ages. . . . These securities for personal liberty thus embodied [in the Bill of Rights and in Article III, section 2, which provides that "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury"], were such as wisdom and experience had demonstrated to be necessary for the protection of those accused of crime. And so strong was the sense of the country of their importance, and so jealous were the people that these rights, highly prized, might be denied them by implication, that when the original Constitution was proposed for adoption it encountered severe opposition; and, but for the belief that it would be so amended as to embrace them, it would never have been ratified.

....

If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for, if this government is continued after the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war. Because, during the late Rebellion it could have been enforced in Virginia, where the national authority was overturned and the courts driven out, it does not follow that it

should obtain in Indiana, where that authority was never disputed, and justice was always administered. And so in the case of a foreign invasion, martial rule may become a necessity in one state, when, in another, it would be 'mere lawless violence.'

....

But it is said that the jurisdiction is complete under the 'laws and usages of war.'

It can serve no useful purpose to inquire what those laws and usages are, whence they originated, where found, and on whom they operate; they can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed. This court has judicial knowledge that in Indiana the Federal authority was always unopposed, and its courts always open to hear criminal accusations and redress grievances; and no usage of war could sanction a military trial there for any offence whatever of a citizen in civil life, in nowise connected with the military service. Congress could grant no such power; and to the honor of our national legislature be it said, it has never been provoked by the state of the country even to attempt its exercise. One of the plainest constitutional provisions was, therefore, infringed when Milligan was tried by a court not ordained and established by Congress, and not composed of judges appointed during good behavior.

Chief Justice Chase, joined by three other Justices, wrote a concurrence, arguing that military tribunals could be employed if they were authorized by Congress:

We think that Congress had power, though not exercised, to authorize the military commission which was held in Indiana.

...

Congress has power to raise and support armies; to provide and maintain a navy; to make rules for the government and regulation of the land and naval forces; and to provide for governing such part of the militia as may be in the service of the United States. It is not denied that the power to make rules for the government of the army and navy is a power to provide for trial and punishment by military courts without a jury. It has been so understood and exercised from the adoption of the Constitution to the present time.

Nor, in our judgment, does the fifth, or any other amendment, abridge that power. 'Cases arising in the land and naval forces, or in the militia in actual service in time of war or public danger,' are expressly excepted from the fifth amendment, 'that no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury,' and it is admitted that the exception applies to the other amendments as well as to the fifth. . . . It is not necessary to attempt any precise definition of the boundaries of [Congress's] power. But may it not be said that government includes protection and defence as well as the regulation of internal administration? And is it impossible to imagine cases in which citizens conspiring or attempting the destruction or great injury of the national forces may be subjected by Congress to military trial and punishment in the just exercise of this undoubted constitutional power? Congress is but the agent of the nation, and does not the security of individuals against the abuse of this, as of every other power, depend on the intelligence and virtue of the people, on their zeal for public and private liberty, upon official

responsibility secured by law, and upon the frequency of elections, rather than upon doubtful constructions of legislative powers?

.....

Congress has the power not only to raise and support and govern armies but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authorities essential to its due exercise. But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President. . . . Congress cannot direct the conduct of campaigns, nor can the President, or any commander under him, without the sanction of Congress, institute tribunals for the trial and punishment of offences, either of soldiers or civilians, unless in cases of a controlling necessity, which justifies what it compels, or at least insures acts of indemnity from the justice of the legislature.

We by no means assert that Congress can establish and apply the laws of war where no war has been declared or exists. Where peace exists the laws of peace must prevail. What we do maintain is, that when the nation is involved in war, and some portions of the country are invaded, and all are exposed to invasion, it is within the power of Congress to determine in what states or district such great and imminent public danger exists as justifies the authorization of military tribunals for the trial of crimes and offences against the discipline or security of the army or against the public safety.

In Indiana, for example, at the time of the arrest of Milligan and his co- conspirators, it is established by the papers in the record, that the state was a military district, was the theatre of military operations, had been actually invaded, and was constantly threatened with invasion. It appears, also, that a powerful secret association, composed of citizens and others, existed within the state, under military organization, conspiring against the draft, and plotting insurrection, the liberation of the prisoners of war at various depots, the seizure of the state and national arsenals, armed cooperation with the enemy, and war against the national government.

We cannot doubt that, in such a time of public danger, Congress had power, under the Constitution, to provide for the organization of a military commission, and for trial by that commission of persons engaged in this conspiracy. The fact that the Federal courts were open was regarded by Congress as a sufficient reason for not exercising the power; but that fact could not deprive Congress of the right to exercise it. Those courts might be open and undisturbed in the execution of their functions, and yet wholly incompetent to avert threatened danger, or to punish, with adequate promptitude and certainty, the guilty conspirators.

The Supreme Court next considered the constitutionality of military tribunals during World War II.

EX PARTE QUIRIN

317 U.S. 1 (1942)

[During World War II eight Nazi saboteurs were sent by submarine to the United States. They landed on American soil (at Florida and at Long Island, NY) armed with explosives, and buried the uniforms they were wearing. They were arrested after one saboteur turned himself into the FBI and helped the FBI locate the others. One of the eight, Haupt, argued that he was an American citizen because his parents were naturalized while he was a child and he never renounced his American citizenship.

President Roosevelt issued an Executive Order and Proclamation authorizing military trials for the saboteurs. The defendants were charged with violating the law of war, espionage, providing information to the enemy, and conspiracy. During the trials, the saboteurs sought habeas review both in federal district court and in the U.S. Supreme Court, which upheld the military conviction and death sentence for the saboteurs based on the charge that they had violated the laws of war.]

CHIEF JUSTICE STONE delivered the opinion of the Court:.

The Government . . . insists that petitioners must be denied access to the courts, both because they are enemy aliens or have entered our territory as enemy belligerents, and because the President's Proclamation undertakes in terms to deny such access to the class of persons defined by the Proclamation, which aptly describes the character and conduct of petitioners. . . . But there is certainly nothing in the Proclamation to preclude access to the courts for determining its applicability to the particular case. And neither the Proclamation nor the fact that they are enemy aliens forecloses consideration by the courts of petitioners' contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission. . . .

From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals. By the Articles of War, and especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases.¹ Congress, in addition to making rules for the government of our Armed Forces, has thus exercised its authority to define and punish offenses against the law of nations [under Article I section 8, cl. 10] by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such

¹[Footnote by eds.] Article 15, now codified at 10 U.S.C. ' 821 (1994), provides that "The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals."

tribunals. And the President, as Commander in Chief, by his Proclamation in time of war has invoked that law. By his Order creating the present Commission he has undertaken to exercise the authority conferred upon him by Congress, and also such authority as the Constitution itself gives the Commander in Chief, to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war. . . .

It is unnecessary for present purposes to determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation. For here Congress has authorized trial of offenses against the law of war before such commissions. We are concerned only with . . . whether any of the acts charged is an offense against the law of war cognizable before a military tribunal, and if so whether the Constitution prohibits the trial. We may assume that there are acts regarded in other countries, or by some writers on international law, as offenses against the law of war which would not be triable by military tribunal here, either because they are not recognized by our courts as violations of the law of war or because they are of that class of offenses constitutionally triable only by a jury. It was upon such grounds that the Court denied the right to proceed by military tribunal in *Ex parte Milligan*. . . .

It is no objection that Congress in providing for the trial of such offenses has not itself undertaken to codify that branch of international law or to mark its precise boundaries, or to enumerate or define by statute all the acts which that law condemns. An Act of Congress punishing 'the crime of piracy as defined by the law of nations' is an appropriate exercise of its constitutional authority, Art. I, s 8, cl. 10, 'to define and punish' the offense since it has adopted by reference the sufficiently precise definition of international law. Similarly by the reference in the 15th Article of War to 'offenders or offenses that . . . by the law of war may be triable by such military commissions', Congress has incorporated by reference, as within the jurisdiction of military commissions, all offenses which are defined as such by the law of war and which may constitutionally be included within that jurisdiction. Congress had the choice of crystallizing in permanent form and in minute detail every offense against the law of war, or of adopting the system of common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts. It chose the latter course.

By universal agreement and practice the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals. . . .

Our Government, by thus defining lawful belligerents entitled to be treated as prisoners of war, has recognized that there is a class of unlawful belligerents not entitled to that privilege, including those who though combatants do not wear 'fixed and distinctive emblems' [marking them as enemy soldiers]. And by Article 15 of the Articles of War Congress has made provision

for their trial and punishment by military commission, according to 'the law of war'.

By a long course of practical administrative construction by its military authorities, our Government has likewise recognized that those who during time of war pass surreptitiously from enemy territory into our own, discarding their uniforms upon entry, for the commission of hostile acts involving destruction of life or property, have the status of unlawful combatants punishable as such by military commission. This precept of the law of war has been so recognized in practice both here and abroad, and has so generally been accepted as valid by authorities on international law that we think it must be regarded as a rule or principle of the law of war recognized by this Government by its enactment of the Fifteenth Article of War. . . .

As we have seen, entry upon our territory in time of war by enemy belligerents, including those acting under the direction of the armed forces of the enemy, for the purpose of destroying property used or useful in prosecuting the war, is a hostile and war-like act. It subjects those who participate in it without uniform to the punishment prescribed by the law of war for unlawful belligerents. It is without significance that petitioners were not alleged to have borne conventional weapons or that their proposed hostile acts did not necessarily contemplate collision with the Armed Forces of the United States. . . . Modern warfare is directed at the destruction of enemy war supplies and the implements of their production and transportation quite as much as at the armed forces. Every consideration which makes the unlawful belligerent punishable is equally applicable whether his objective is the one or the other. The law of war cannot rightly treat those agents of enemy armies who enter our territory, armed with explosives intended for the destruction of war industries and supplies, as any the less belligerent enemies than are agents similarly entering for the purpose of destroying fortified places or our Armed Forces. By passing our boundaries for such purposes without uniform or other emblem signifying their belligerent status, or by discarding that means of identification after entry, such enemies become unlawful belligerents subject to trial and punishment.

Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war. Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts are enemy belligerents within the meaning of the Hague Convention and the law of war. It is as an enemy belligerent that petitioner Haupt is charged with entering the United States, and unlawful belligerency is the gravamen of the offense of which he is accused.

Nor are petitioners any the less belligerents if, as they argue, they have not actually committed or attempted to commit any act of depredation or entered the theatre or zone of active military operations. The argument leaves out of account the nature of the offense which the Government charges and which the Act of Congress, by incorporating the law of war, punishes. It is that each petitioner, in circumstances which gave him the status of an enemy belligerent, passed our military and naval lines and defenses or went behind those lines, in civilian dress and with hostile purpose. The offense was complete when with that purpose they entered--or, having so entered, they remained upon--our territory in time of war without uniform or other appropriate means of identification. For that reason, even when committed by a citizen, the offense is distinct from the crime of treason defined in Article III, s 3 of the Constitution, since the absence of uniform essential to one is irrelevant to the other.

But petitioners insist that even if the offenses with which they are charged are offenses against the law of war, their trial is subject to the requirement of the Fifth Amendment that no

person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, and that such trials by Article III, s 2, and the Sixth Amendment must be by jury in a civil court. . . .

Presentment by a grand jury and trial by a jury of the vicinage where the crime was committed were at the time of the adoption of the Constitution familiar parts of the machinery for criminal trials in the civil courts. But they were procedures unknown to military tribunals, which are not courts in the sense of the [Article III]. . . . [I]t was not the purpose or effect of s 2 of Article III, read in the light of the common law, to enlarge the then existing right to a jury trial. The object was to preserve unimpaired trial by jury in all those cases in which it had been recognized by the common law and in all cases of a like nature as they might arise in the future, but not to bring within the sweep of the guaranty those cases in which it was then well understood that a jury trial could not be demanded as of right.

The Fifth and Sixth Amendments, while guaranteeing the continuance of certain incidents of trial by jury which Article III, s 2 had left unmentioned, did not enlarge the right to jury trial as it had been established by that Article. Hence petty offenses triable at common law without a jury may be tried without a jury in the federal courts, notwithstanding Article III, s 2, and the Fifth and Sixth Amendments. Trial by jury of criminal contempts may constitutionally be dispensed with in the federal courts in those cases in which they could be tried without a jury at common law. Similarly, an action for debt to enforce a penalty inflicted by Congress is not subject to the constitutional restrictions upon criminal prosecutions.

All these are instances of offenses committed against the United States, for which a penalty is imposed, but they are not deemed to be within Article III, s 2 or the provisions of the Fifth and Sixth Amendments relating to 'crimes' and 'criminal prosecutions'. In the light of this long-continued and consistent interpretation we must conclude that s 2 of Article III and the Fifth and Sixth Amendments cannot be taken to have extended the right to demand a jury to trials by military commission, or to have required that offenses against the law of war not triable by jury at common law be tried only in the civil courts. . . .

Section 2 of the Act of Congress of April 10, 1806, 2 Stat. 371, derived from the Resolution of the Continental Congress of August 21, 1776, imposed the death penalty on alien spies 'according to the law and usage of nations, by sentence of a general court martial'. This enactment must be regarded as a contemporary construction of both Article III, s 2, and the Amendments as not foreclosing trial by military tribunals, without a jury, of offenses against the law of war committed by enemies not in or associated with our Armed Forces. It is a construction of the Constitution which has been followed since the founding of our government, and is now continued in the 82nd Article of War. Such a construction is entitled to the greatest respect. It has not hitherto been challenged, and so far as we are advised it has never been suggested in the very extensive literature of the subject that an alien spy, in time of war, could not be tried by military tribunal without a jury. [In a footnote the Court lists a number of cases during the Revolutionary War, the War of 1812 and the Civil War in which enemy spies were tried and convicted by military tribunals.]

The exception from the Amendments of 'cases arising in the land or naval forces' was not aimed at trials by military tribunals, without a jury, of such offenses against the law of war. Its objective was quite different--to authorize the trial by court martial of the members of our Armed Forces for all that class of crimes which under the Fifth and Sixth Amendments might otherwise have been deemed triable in the civil courts. The cases mentioned in the exception are not

restricted to those involving offenses against the law of war alone, but extend to trial of all offenses, including crimes which were of the class traditionally triable by jury at common law.

Since the Amendments, like s 2 of Article III, do not preclude all trials of offenses against the law of war by military commission without a jury when the offenders are aliens not members of our Armed Forces, it is plain that they present no greater obstacle to the trial in like manner of citizen enemies who have violated the law of war applicable to enemies. Under the original statute authorizing trial of alien spies by military tribunals, the offenders were outside the constitutional guaranty of trial by jury, not because they were aliens but only because they had violated the law of war by committing offenses constitutionally triable by military tribunal. We cannot say that Congress in preparing the Fifth and Sixth Amendments intended to extend trial by jury to the cases of alien or citizen offenders against the law of war otherwise triable by military commission, while withholding it from members of our own armed forces charged with infractions of the Articles of War punishable by death. It is equally inadmissible to construe the Amendments-- whose primary purpose was to continue unimpaired presentment by grand jury and trial by petit jury in all those cases in which they had been customary--as either abolishing all trials by military tribunals, save those of the personnel of our own armed forces, or what in effect comes to the same thing, as imposing on all such tribunals the necessity of proceeding against unlawful enemy belligerents only on presentment and trial by jury. We conclude that the Fifth and Sixth Amendments did not restrict whatever authority was conferred by the Constitution to try offenses against the law of war by military commission, and that petitioners, charged with such an offense not required to be tried by jury at common law, were lawfully placed on trial by the Commission without a jury.

Petitioners, and especially petitioner Haupt, stress the pronouncement of this Court in the Milligan case, that the law of war 'can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed'. Elsewhere in its opinion, the Court was at pains to point out that Milligan, a citizen twenty years resident in Indiana, who had never been a resident of any of the states in rebellion, was not an enemy belligerent either entitled to the status of a prisoner of war or subject to the penalties imposed upon unlawful belligerents. We construe the Court's statement as to the inapplicability of the law of war to Milligan's case as having particular reference to the facts before it. From them the Court concluded that Milligan, not being a part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the law of war save as--in circumstances found not there to be present and not involved here--martial law might be constitutionally established.

The Court's opinion is inapplicable to the case presented by the present record. We have no occasion now to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals to try persons according to the law of war. It is enough that petitioners here, upon the conceded facts, were plainly within those boundaries, and were held in good faith for trial by military commission, charged with being enemies who, with the purpose of destroying war materials and utilities, entered or after entry remained in our territory without uniform--an offense against the law of war. We hold only that those particular acts constitute an offense against the law of war which the Constitution authorizes to be tried by military commission.

[The Court rejected the petitioner's claim that the military tribunals were conducted contrary to procedures established by the Articles of War]

Petitioners [contend] that, if Congress has authorized their trial by military commission upon the charges preferred--violations of the law of war and the 81st and 82nd Articles of War--it has by the Articles of War prescribed the procedure by which the trial is to be conducted; and that since the President has ordered their trial for such offenses by military commission, they are entitled to claim the protection of the procedure which Congress has commanded shall be controlling.

We need not inquire whether Congress may restrict the power of the Commander in Chief to deal with enemy belligerents. For the Court is unanimous in its conclusion that the Articles in question could not at any stage of the proceedings afford any basis for issuing the writ. But a majority of the full Court are not agreed on the appropriate grounds for decision. Some members of the Court are of opinion that Congress did not intend the Articles of War to govern a Presidential military commission convened for the determination of questions relating to admitted enemy invaders and that the context of the Articles makes clear that they should not be construed to apply in that class of cases. Others are of the view that--even though this trial is subject to whatever provisions of the Articles of War Congress has in terms made applicable to 'commissions'--the particular Articles in question, rightly construed, do not foreclose the procedure prescribed by the President or that shown to have been employed by the Commission in a trial of offenses against the law of war and the 81st and 82nd Articles of War, by a military commission appointed by the President.

Accordingly, we conclude that Charge I, on which petitioners were detained for trial by the Military Commission, alleged an offense which the President is authorized to order tried by military commission; that his Order convening the Commission was a lawful order and that the Commission was lawfully constituted; that the petitioners were held in lawful custody and did not show cause for their discharge. It follows that the orders of the District Court should be affirmed, and that leave to file petitions for habeas corpus in this Court should be denied.

Discussion

1. *Who is an enemy belligerent?* *Quirin* argues that enemy belligerents who violate the laws of war may be tried by military tribunals. It distinguishes *Ex parte Milligan* on the grounds that Milligan was not an enemy belligerent either entitled to the status of a prisoner of war or subject to the penalties imposed upon unlawful belligerents.® Indeed, according to the *Quirin* court, Milligan was actually a non-belligerent. Is this distinction sound? Why wasn't Milligan, in *Quirin*'s words, a citizen who associate[d] [himself] with the military arm of the enemy government, and with its aid, guidance and direction enter[ed] this country bent on hostile acts.® Is the answer that, as the court says earlier in the opinion, what Milligan was charged with crimes that were either not recognized by our courts as violations of the law of war or [were] of that class of offenses constitutionally triable only by a jury?® Given that the Court allows the definition of what violates the laws of war to proceed through common law elaboration, is this distinction convincing?

Consider another possibility: while the saboteurs in *Quirin* were clearly or admittedly members of an enemy force, a key question in *Milligan* was whether Milligan actually was a belligerent or had been mistakenly arrested by the military forces. It is one thing to try an enemy

belligerent whose identity has already been established before a military commission; it is quite another to exercise military authority over people simply on the President's say so. Suppose, for example, that Attorney General Ashcroft asserts that an American citizen of Arab ethnicity living in Chicago is actually a secret al-Qaeda operative who is conspiring with others to blow up a building. May the Justice department immediately turn this person over to the military authorities for a secret trial by a military commission? Obviously, the question of whether someone is an enemy operative may be adjudicated in front of a military commission, but this would occur without the procedural guarantees of the Bill of Rights ordinarily afforded citizens (and resident aliens). Note, moreover, that the issue is not simply trial, it is also detention. For example, what would prevent the Attorney General from handing an accused person over to the military authorities and holding him or her indefinitely on the grounds that the person is an unlawful belligerent? (If the fifth and sixth amendments do not apply to persons under military jurisdiction, would the sixth amendment's constitutional requirement of a speedy trial?).

Under this reading, *Quirin* does not provide sufficient authority for trying persons before military tribunals when the question of jurisdiction—who may be tried by a military tribunal—cannot be separated from the merits—whether there was a violation of the laws of war. Otherwise, the President's authority could sweep too broadly to violate the rights of innocent parties and possibly even chill dissent by Arab-Americans who disagree with the President's foreign policy. Similarly, under this reading, before a citizen is handed over to the military authorities for detention during the course of a war, there must first be a federal hearing as to whether the citizen is an enemy combatant.

2. *Presidential Power to create military tribunals.* *Quirin* does not decide whether the president may create tribunals without Congressional consent given his inherent authority as Commander-in-Chief. Instead, it holds that the President's action was supported by congressional authorization, stemming from the Articles of War, and in particular, Article 15. On its face, the text of Article 15 merely preserves concurrent jurisdiction if military tribunals are in fact authorized. Do you agree with the Court that it can be read as an explicit authorization of the creation of military tribunals?

What structural arguments can be offered for requiring prior Congressional authorization instead of allowing the President to proceed unilaterally? Do they have special force in the context of the current War against Terrorism? Conversely, what structural arguments justify allowing the President to go forward without express Congressional approval? Given that the language of Article 15 does not clearly authorize military tribunals as much as preserve the possibility of concurrent jurisdiction, one might read *Quirin* as stretching to find Congressional authorization in circumstances of political necessity (the case was decided in July of 1942, less than nine months after Pearl Harbor) so as not to give the President carte blanche in later years. If so, was this sound? Should Congress be deemed to have acquiesced to this construction by not amending Article 15 later on to make its views clearer?

Because Article 15's successor is still on the books, does it follow from *Quirin* that Congress has given a continuing authorization to create military tribunals whenever the President sees fit? Consider the argument that *Quirin* is distinguishable because it arose after a formal declaration of war. (Compare Chief Justice Chase's concurrence in *Milligan*). Why should this matter, given that Presidents often exercise their commander-in-chief powers and send troops into combat situations without formal declarations of war? Note, in any case, that Congress gave

authorization to the war effort by a joint resolution on September 18, 2001, which Aauthorize[s]' the President . . . to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.@

On the other hand, note that President Bush's order is not limited to such persons; it applies to anyone the President deems an international terrorist. In addition, the President's order is not limited to violations of the laws of war, which was the basis of the decision in *Quirin*, but conceivably extends to other violations of law. Conversely, if the regulations are construed to be limited only to violations of the international laws of war, it remains unclear whether sporadic acts of violence or acts by individuals not acting on behalf of a nation-state, like the al-Qaeda network, are covered. (Can you think of why they should be?).

3. *Indefinite detention for American citizens accused of being enemy combatants.* Does the September 18th resolution justify not only military tribunals for non-citizens but also the indefinite detention of American citizens accused of working with the al-Qaeda terrorist network? Under this theory such persons would be no different from any other enemy combatants who may be held by the military during the course of a war to prevent them from engaging in further hostile acts. Consider the case of Jose Padilla, a convert to Islam, whom the Administration accused of conspiring with al-Qaeda members to create a Adirty bomb@that would explode radioactive materials into the civilian population. The Administration transferred Padilla to military custody, arguing that it had the right to hold him indefinitely without trial until the end of the War on Terrorism. (If the War on Terrorism lasts as long as the Cold War, this obviously could be for a very long time.) Does someone like Padilla have a right to be represented by an attorney in a hearing before a civilian court to determine whether he is in fact an enemy combatant before he can be transferred to the military authorities for indefinite detention? See *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Circuit 2003)(when "a habeas petitioner has been designated an enemy combatant and it is undisputed that he was captured in a zone of active combat operations abroad, further judicial inquiry is unwarranted when the government has responded to the petition by setting forth factual assertions which would establish a legally valid basis for the petitioner's detention."); *Padilla v. Rumsfeld*, 256 F.Supp. 2d 218 (S.D.N.Y. 2003)(certifying interlocutory appeal on Jose Padilla's rights to consult with an attorney and contest factual assertions offered by government).

4. *Acts committed on American soil versus acts committed on foreign soil.* *Milligan* and *Quirin* concerned activities on American soil. Is the constitutional case for military tribunals stronger when the acts are committed overseas? Consider *In re Yamashita*, 327 U.S. 1 (1946), which upheld the use of a military commission ordered by General William D. Styer, who commanded U.S. forces in the Philippines, to try General Yamashita, the commander of the Japanese army in the Philippines, for allowing his men to engage in atrocities. Once again the Court found Congressional authorization in the Articles of War, and stated that a military commission may be convened even Aafter hostilities have ended to try violations of the law of war committed before their cessation, at least until peace has been officially recognized by treaty or proclamation of the political branch of the Government.@ Consider George Fletcher's comment that

The offenses committed in the Philippines were not subject to prosecution under American law in an American courtroom. Perhaps they could have been tried in the Philippines--and, in the future, in the International Criminal Court--but there was no sense in which General Styer was trying to take a case away from the civilian courts in the United States. It was either prosecution in his tribunal or no American initiative at all.²

In addition to where the acts were committed, also consider the question of where the tribunals are constituted. *Milligan* by its terms applies to a situation where the civil courts are open. Does this mean that tribunals assembled in a foreign country are more likely to be constitutional than tribunals held on American soil? Note that this creates an incentive for the Administration to detain persons outside of the civil jurisdiction of United States^B for example on the U.S. naval base on Guantanamo Bay in Cuba.

5. *The suspension of Habeas Corpus.* The Bush Order by its terms precludes persons who are subject to the jurisdiction of military tribunals from any remedy or proceeding by any court. An important question left unresolved is whether the Bush Order is meant to prevent writs of habeas corpus for persons detained by the military under the authority of the order or tried by military tribunals. For example, consider the case of a resident alien accused by the Justice Department of conspiring with al-Qaeda and handed over to the military authorities for indefinite detention. Does this person have the right to bring a writ of habeas corpus challenging the legality of his or her detention? A right to bring a writ of habeas corpus to review the conviction and sentence if a military tribunal is eventually held?

Does your answer change if the person detained is an American citizen? The Bush Order does not apply to citizens, but, as noted above, the President might argue that the September 18th authorization gives him the power to detain citizens as well as aliens suspected of being enemy belligerents. If the President has this power, does he also have the power to suspend habeas corpus review for American citizens?

Do Lincoln's actions during the civil war serve as a precedent for a President suspending the writ today for persons suspected of engaging in or assisting international terrorism? (Recall the argument from *Ex parte Merryman* that suspension of the writ under Article I, section 9 requires Congressional authorization.) Consider the following argument: because Congress has authorized military tribunals under Article 15, it has in effect also authorized suspension of the writ for anyone who might be subject to a military tribunal. Traditionally, courts have required a clear statement before permitting Congressional repeal of habeas jurisdiction. See, e.g., *INS v. St. Cyr*, 121 S. Ct. 2271, 2278 (2001). Should courts simply read into the Executive Order an exception for habeas review, as was done in *Quirin*?

²George Fletcher, On Justice and War: Contradictions in the Proposed Military Tribunals, 25 Harv. J. L. & Pub. Policy 635, 645 (2002).

On the other hand, is habeas review enough? Or should the constitution demand direct review by courts? Note that habeas petitions in lower courts face many jurisdictional obstacles and the Supreme Court rarely takes direct habeas petitions. Does your answer to this question depend on whether the events took place overseas or on American soil, and whether the accused is a U.S. citizen, a resident alien, or a foreign national?

6. *The role of executive precedent in constitutional interpretation.* In *Quirin* the court notes a long history of military tribunals. Does the fact that military tribunals have been used consistently by the Executive, sometimes with Congressional authorization, and sometimes without determine the question of their constitutionality? Note that there are two different trends in constitutional interpretation. Where individual rights are concerned, courts often reject the claim that a practice is made constitutional by the fact that it has occurred for many years. For example, racial segregation and sex discrimination could not be justified on the ground that racism and sexism were pervasive, and the criminal procedure decisions of the Warren Court swept away many traditional state practices that violated the rights of persons accused of crime. On the other hand, in determining the scope of national power, the balance of power between Congress and the President, and particularly the President's powers in foreign policy, courts often look to the historical development of a practice. The question of military tribunals, however, implicates both separation of powers and individual rights concerns. What weight, then, should courts give to the long history of military tribunals?

7. *The Treason Clause.* Note *Quirin*'s reference to the Treason Clause of article III, section 3, cl. 1: A Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court. One evident purpose of the Treason Clause which constitutionalizes the definition of treason was to avoid the misuse of the crime for political purposes by the British Crown. Note that the Court suggests that the trial of Haupt, who claimed to be a U.S. citizen, could proceed before a military tribunal because he was not directly charged with treason, but merely with violating the laws of war by working for the enemy without wearing a uniform. If the government had proceeded against Haupt for treason, it would have faced considerable difficulties, given the Treason Clause's constitutional requirements of two witnesses and an open proceeding as to at least some aspects of the trial. Consider in this respect the case of John Walker Lindh, an American citizen who was discovered fighting with the Taliban in the U.S. military action in Afghanistan. Does it make sense to allow the federal government to skirt the requirements of the Treason Clause by defining other crimes which are effectively the same as treason but which have slightly different requirements? Is the Treason Clause a dead letter? Should it be in today's world?

8. *Quirin's context.* It is obvious that *Quirin* is a wartime decision, unlike, say, *Milligan*, which occurred after the Civil War was concluded. Public announcement of the capture of the saboteurs was made on June 27, 1942. On July 2, President Roosevelt appointed the military commission that tried them. The trial began on six days later. After the saboteurs were convicted and six of them sentenced to death, two Army colonels appointed by the President to defend the saboteurs before the commission sought judicial review. On July 27 the Supreme Court indicated that it

would hear argument on the question. According to the New York Times on the following day, "Decision to seek recourse in the Supreme Court did not meet popular approval in Washington. On the contrary, there is great dissatisfaction here with the length to which the [military] trial has already proceeded." As Alpheus Mason, the biographer of Chief Justice Harlan Stone, explained, "The *Times* had put it mildly." Indeed, on July 29 the *Times* reported the reigning congressional sentiment through the words of New York Representative Emmanuel Celler: "Our people are of the opinion that the eight Nazi saboteurs should be executed with all possible dispatch. . . . They are confident that the military tribunal will decree their death. Any interference with that trial by civil court would strike a severe blow to public morale."³

On July 29, when the Supreme Court convened for the hearing, Associate Justice Frank Murphy, who had been commissioned a lieutenant colonel in the Army reserves after repeatedly lobbying for an appointment, arrived at Court wearing his military uniform. This caused such a scandal among his fellow Justices that Murphy recused himself from the case.⁴

³Alpheus Thomas Mason, *Harlan Fiske Stone* 653-661 (1956).

⁴Do you agree that Murphy should have recused himself? Why? For wearing his uniform to Court to hear *Quirin* or for having enlisted in the Armed Forces in the first place?

After hearing the case on July 29, the Court announced its decision two days later, stating that it would file its opinion subsequently. However, the executions of six of the saboteurs followed within a week, well before the *Quirin* opinion was filed. Justice William O. Douglas wrote in his memoirs that Attorney General Francis Biddle had told members of the Court privately, prior to argument, that "the Executive," by which he presumably meant President Roosevelt, "would not tolerate any delay" and "that the claims of the saboteurs were so frivolous [that] the Army was going [to go] ahead and execute the men whatever the Court did." Douglas described this as a "blatant affront to the Court."⁵ Stone's biographer indicates that the Chief Justice, who had assigned himself the task of writing the opinion, had significant doubts that FDR had in fact complied with the Articles of War. In private communications within the Court, Justice Frankfurter agreed that "[t]here can be no doubt that the President did *not* follow the scheme of review under II G of the Articles of War," though he believed that was irrelevant with regard to the disposition of the case. Frankfurter circulated a memo among his colleagues, which he called a "soliloquy": Some of the very best lawyers I know are now in the Solomon Islands battle, some are seeing service in Australia, some are sub-chasers in the Atlantic, and some are on the various air fronts. It requires no pet's imagination to think of their reflections if the unanimous result reached by us in these cases should be expressed in opinions which would black out the agreement in result and reveal internecine conflict about the manner of stating that result. I know some of these men very, very intimately. I think I know what they would deem to be the governing canons of constitutional adjudication in a case like this. And I almost hear their voices were they to read more than a single opinion in this case. They would say something like this, but in language hardly becoming a judge's tongue: "What in hell do you fellows think you are doing? Haven't we got enough of a job trying to lick the Japs and the Nazis without having you fellows on the Supreme Court dissipate the thoughts and feelings and energies of the folks at home by stirring up a nice row as to who has what power, when all of you are agreed that the president had the power to establish this commission and that the procedures under the Articles of War for courts-martial and military commission don't apply to this case? Haven't you got any more sense than to get people by the ear on one of the favorite American pastimes--abstract constitutional discussions? Do we have to another Lincoln-Taney row when everybody is agree and in this particular case the constitutional questions aren't reached? Just relax and don't be too engrossed in your own interest in verbalistic conflicts, because the inroads on energy and national unity that such conflict inevitable[sic] produces, is a pastime we had better postpone until peacetime."⁶

Because there was general agreement within the Court that a unanimous opinion was highly desirable, Stone's opinion skirted some extremely controversial issues in order

⁵ William O. Douglas, *The Court Years* 139 (1980).

⁶ Del Dickson, ed., *The Supreme Court in Conference (1940-1985)* 533 (2001).

to maintain unanimity. Stone himself acknowledged that the opinion in *Quirin* was "somewhat cryptic," though he explained that this "was the result of patient negotiations to get the Court to agree unanimously to rejection of the argument that access to the Court by the prisoner could be denied." To do this, he agreed to delete a stronger statement, that had appeared in an earlier draft, that "even though guilty [the saboteurs] were entitled to be tried by a tribunal and by laws which the Constitution has prescribed as the means of determining their guilt."⁷

In construing the meaning of this "cryptic" opinion, is it legitimate to look at the private memoranda of the judges? The fact that Biddle had warned that the saboteurs would be executed whatever the Court decided? Or do the words "speak for themselves"?

Do the events leading up to the *Quirin* opinion-- including Frankfurter's "soliloquy"-- suggest something about how much we can trust judges to be the "detached" enforcers of constitutional rights in time of war? Is there anything wrong with Frankfurter's display of "passion," or should judges hold themselves to a different standard of conduct and thought? In any event, is this (or any of the material in this note) relevant to considering the precedential value of *Quirin* today?

9. *Commentary on the Military Tribunals.* The Bush Order on military tribunals has been one of the most controversial features of the Administration's response to 9/11. For a sampling of the constitutional issues, See Neal K. Katyal and Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 *Yale L.J.* 1259 (2002); Curtis A. Bradley and Jack L. Goldsmith, *The Constitutional Validity of Military Commissions*, 5 *Green Bag 2d* 249 (2002); George Fletcher, *On Justice and War: Contradictions in the Proposed Military Tribunals*, 25 *Harv. J. L. & Pub. Policy* 635, 645 (2002).

⁷Mason, at 664.