

January 2002

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Recommended Citation

Clark, Gerard J., "Military Tribunals and the Separation of Powers" (2002). *Suffolk University Law School Faculty Publications*. 11.
https://lsr.nellco.org/suffolk_fp/11

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MILITARY TRIBUNALS AND THE SEPARATION OF POWERS

By Gerard J. Clark ¹

Introduction

¹Professor of Law, Suffolk University School of Law. The author wishes to thank Joseph Cronin, Valerie Epps and Jeffrey Pokorak all of the Suffolk Law faculty for their assistance in preparing this article.

On November 13, 2001, President George W. Bush issued an executive order² which provided for the creation of military tribunals for the trial of persons responsible for terrorist attacks against the United States and its overseas agencies. The order was in response to the attacks on September 11, 2001 on the World Trade Center in New York City and the Pentagon outside of Washington D.C. and the initiation of armed hostilities between the United States and Afghanistan. The order stated that “an extraordinary emergency exists” because of “potential acts of terrorism” such that it is “not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.”³ The order is directed against non-citizen terrorists namely: persons about whom “there is reason to believe” that they are “member[s] of the organization known as al Qaeda;” persons who have “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 persons who “knowingly harbored” a person described above. Rules to be promulgated in the future shall govern procedural rules. The tribunals will provide for the “admission of such evidence as would, in the opinion of the presiding officer... have probative value to a reasonable person;” and the protection of classified information. Rules will govern the “conduct of the prosecution... and... of the defense by attorneys for the individual subject to this order;” they will cover conviction and sentence (including the death penalty) only upon the concurrence of two-thirds of the members of the commission, and “submission of the record of the trial, including any conviction or sentence, for review and final decision by me or by the Secretary of Defense...”⁴ Persons subject to the order “shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, ... in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.”⁵

Traditionally a military tribunal (also called a military commission) is a wartime military trial with rules of procedure and evidence fashioned to the circumstances to try persons who

²The order is codified at 66 Fed. Reg. 57833, and reproduced at Appendix A.

³Id at sec 1.

⁴Id at sec 4(c)

⁵Id sec. 7(b)(1).

violate the laws of war. Enemy prisoners of war are excluded by 1977 Protocol II to the 1949 Geneva convention that require enemy combatants to be tried in like fashion to a country's own military personnel, namely court-martial. Thus illegal combatants are covered as are civilians subject to martial law or civilians in territories where the civilian courts are closed. It is made up of an indeterminate number of military officers. The advantage to the government is the protection of secret intelligence sources, less of a media spotlight, easier courtroom security (assuming the locus is a military base), less chances of juror intimidation. Military tribunals have a history that runs back to the revolutionary war. They have been used in the Spanish-American War, the Civil War, World War I and World War II, although not in Korea, Vietnam, or the Persian Gulf. ⁶The first Supreme Court case validating their use was Ex Parte Vallandigham ⁷

This article will seek to investigate whether the president has the power to issue such an order, whether the exclusion of judicial review or access to the writ of habeas corpus is constitutional, and other potential questions that may arise once the order is invoked. ⁸

The Executive Power

⁶Gary D. Solis, Terrorists, Due Process, and Military Commissions Marine Corps Gazette, Feb, 2002, p. 46.

⁷68 U.S. 243 (1863)

⁸The completion date for this article is March 1, 2002. As of that date no additional rules or regulations pursuant to the order have been issued. Nor has the order been invoked. The government could have invoked the order against Zacarias Moussaoui, a thirty-three year old French citizen of Moroccan descent, who is facing the death penalty for conspiracy to participate in the events of September 11. His trial in the U.S. District Court in Alexandria Virginia is scheduled to begin on October 14, 2002. New York Times, Feb 8, 2002, p. 1. Likewise Richard Reid, the "shoe-bomber," arrested on December 22, 2001 will be tried in the United States District Court for the District of Massachusetts, although arguably subject to the order as a British citizen. John Walker Lindh the American is not subject to the Order because of his US citizenship

In the Steel Seizure Case⁹, the Supreme Court invalidated the seizure of the plaintiff's steel mills by the Secretary of Commerce pursuant to an Executive Order of President Truman. A threatened strike would have closed the mills and left the country short of steel which the President considered vital to success in the Korean War. The Court, per Justice Black, held that the President lacked the claimed power. The rule was stated in absolute terms: "The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself."¹⁰ The Defense Production Act and the Taft-Hartley Act were reviewed and found not to authorize seizure. The President's powers as commander-in-chief were insufficient to justify the seizure because it was insufficiently connected with "day to day fighting in the theater of war." 11

⁹Youngstown Sheet and Tube Co. v. Sawyer 343 U.S. 579 (1952)

¹⁰Id., p. 585.

¹¹"It is clear that if the President had authority to issue the order, it must be found in some provision of the Constitution. And it is not claimed that express constitutional language grants this power to the President. The contention is that presidential powers should be implied from the aggregate of his powers under the Constitution. Particular reliance is placed on provisions in Article II which say that "The executive powers shall be vested in a President..."; that "he shall take Care that the Laws be faithfully executed"; and that he "shall be Commander in Chief of the Army and Navy of the United States." The order cannot properly be sustained as an exercise of the President's military power as Commander in Chief of the Armed Forces. The Government attempts to do so by citing a number of cases upholding broad powers in military commanders engaged in day-to-day fighting in the theater of war. Such cases need not concern us here. Even though "theater of war" be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military authorities. At p. 587.

Justice Jackson, concurring, took a more flexible approach to the question. He suggested that there were three categories of presidential action: those in which he has “implied or express authorization of Congress,” those in which there is an “absence of either a Congressional grant or denial of authority,” and those actions that are “incompatible with the express or implied will of Congress.”¹² He then reviewed the legislation and like Justice Black found no authority, although he found other examples in which Congress authorized property seizures.¹³ Thus it would appear that the power as commander in chief is not sufficient to justify the order

On the other hand, presidents have issued Executive Orders creating military tribunals in the past. President Roosevelt by proclamation of July 2, 1942 created a military tribunal which tried and convicted the Germans saboteurs. This order was approved in Ex Parte Quirin.¹⁴

The Legislative Power

¹²Id at 637.

¹³See generally, Edward S. Corwin, The Steel Seizure Case: A Judicial Brick without Straw 53 Colum. L. Rev. 53 (1953); Paul Freund, Foreward: The Year of the Steel Seizure Case, 66 Harv. L. Rev. (1952); Kauper, The Steel Seizure Case: Congress, the President, and the Supreme Court 51 Mich. L. Rev. 141 (1952).

¹⁴Discussed infra at p. . Other presidents that created military tribunals included Washington, Lincoln, Johnson, Jackson, Polk, and Truman. Gary Solis, op.cit. P. 46

In support of this order, the President cited three statutes: the resolution of both houses of Congress to authorize the use of military force against the terrorist organization that sponsored the September 11 attack.¹⁵ This resolution invoked the authority of the War Powers Resolution of 1973, which was enacted after Viet Nam and Watergate, over President Nixon's veto to limit the introduction of troops into hostilities without consultation with Congress.¹⁶ In support of President Bush, Congress declared that the required consultation has occurred and that it fully concurred with the President's decision to introduce troops, wherever he determined that terrorists have been aided or harbored or indeed to prevent future acts of terrorism.¹⁷ In addition, the President invoked authority based in two provisions of the Code of Military Justice, Section 821¹⁸ which grants subject matter jurisdiction to courts martial and does not otherwise "deprive... military tribunals of

¹⁵Whereas, on September 11, 2001, acts of treacherous violence were committed against the United States and its citizens; and
 Whereas, such acts render it both necessary and appropriate that the United States exercise its right to self-defense and to protect United States citizens both at home and abroad; and
 Whereas, in light of the threat to the national security and foreign policy of the United States posed by these grave acts of violence; and
 Whereas, such acts continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States; and
 Whereas, the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States: Now, therefore, be it Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,...

That the President is authorized 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.

¹⁶Sofaer, The War Powers Resolution and Kosovo 34 Loyola L. Rev 71 (2000); Ely, John Hart, War and Responsibility: Constitutional Lessons of Viet Nam and its Aftermath (1993)

¹⁷(b) War Powers Resolution Requirements -
 (1) SPECIFIC STATUTORY AUTHORIZATION - Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.
 (2) APPLICABILITY OF OTHER REQUIREMENTS - Nothing in this resolution supersedes any requirement of the War Powers Resolution.

¹⁸10 U.S.C. sec. 821.

concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war" allow for such trials. ¹⁹ An issue may arise as to whether the attacks on the world trade center violate the laws of war which cover armed conflict between nations. ²⁰ Al Qaeda and others responsible for the attack are not states; it may be more accurate to label them as criminal acts, which would divest the military commissions of their jurisdiction. Section 36 allows the President to make pre-trial, trial and post-trial rules, including modes of proof. ²¹

Congress has authority to enact these statutes under a number of clauses of Article I section 8: to constitute inferior tribunals, to define and punish offenses against the law of nations, to declare war, to make rules concerning captures, to raise and support armies, to provide and maintain a navy, to make rules for the regulation of the land and naval forces and to repel invasions ²².

¹⁹ "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".

²⁰ ABA Task Force on Terrorism and the Law, Report and Recommendation on Military Commissions, issued Jan. 4, 2002 p. 7.

²¹ 10 U.S.C. sec. 836. The President may prescribe rules (a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, 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.

(b) All rules and regulations made under this article shall be uniform insofar as practicable.

²² U.S. Constitution Art. I Sec. 8. Contrast the description in the text with that of Hamilton in Federal 23 where he suggests that the power to engage in foreign affairs and the power to wage war are attributes of sovereignty and thus not dependent upon any affirmative grant of power. See also, U.S. v. Macintosh 283 U.S. 605, 622 (1931) (approving the denial of citizenship to one who refused to unqualifiedly take up arms on behalf of the United States) "From its very nature, the war power, when necessity calls for its exercise, tolerates no qualifications or limitations, unless found in the Constitution or in applicable principles of international law. In the words of John Quincy Adams, -- "This power is tremendous; it is strictly constitutional; but it breaks down every barrier so anxiously erected for the protection of liberty, property and of life." To the end that war may not result in defeat, freedom of speech may, by act of Congress, be curtailed or denied so that the morale of the people and the spirit of the army may not be broken

by seditious utterances; freedom of the press curtailed to preserve our military plans and movements from the knowledge of the enemy; deserters and spies put to death without indictment or trial by jury; ships and supplies requisitioned; property of alien enemies, theretofore under the protection of the Constitution, seized without process and converted to the public use without compensation and without due process of law in the ordinary sense of that term; prices of food and other necessities of life fixed or regulated; railways taken over and operated by the government; and other drastic powers, wholly inadmissible in time of peace, exercised to meet the emergencies of war.”

Applying Steel Seizure, Congress' power in this arena is broad and it has engaged in very broad delegation to the executive. Under the Jackson opinion,²³ the President's power is "at its maximum" because he has been granted express authority which he can combine with his own powers as Commander-in-Chief and to take care that the Laws be faithfully executed.²⁴ Notwithstanding all of this, the order has broader applicability than to those guilty of violations of the laws of war. For instance, the Order applies to any member of Al Qaida and to those who harbor terrorists. Such persons are not necessarily violators of the laws of war.

The Judicial Power

Marbury v. Madison,²⁵ of course, makes the Court the final arbiter of meaning of the Constitution. Historically, however, the Court has shown restraint²⁶ when reviewing action of the military²⁷, or decisions of the Executive branch concerning national security²⁸ or foreign affairs.²⁹ The Court has also approved broad powers in Congress over immigration and naturalization.³⁰

²³Gerard J. Clark, Checks and Imbalances, 72 Mass L. Rev. 15 (1987) (praising the flexibility of Jackson's opinion)

²⁴U.S. Constitution Art. II sec 3.

²⁵5 U.S. 137 (1803)

²⁶Gerard J. Clark, An Introduction to Constitutional Interpretation (forthcoming) Suff. L. Rev. (review of activism and restraint)

²⁷Korematsu v. United States, 323 U.S. 214 (1944) (Approving a military order evacuating Japanese Americans from certain parts of the west coast during World War II); Hirabayashi v. United States, 320 U.S. 81 (1943) (same); subsequently repudiated with compensation paid to the Japanese victims see Comm' on Wartime Relocation and Internment of Civilians: Personal Justice Denied (1982) cited in Dycus et al. Eds. National Security Law 2nd Ed. 1997 at 572-3; Rostker v. Goldberg, 453 U.S. 101 (1981) (siding with the military command in approving an all male draft); The Prize Cases, 67 U.S. 635 (1863) (Approving Lincoln's blockade of Southern ports)

²⁸Haig v. Agee, 453 U.S. 280 (1981) (approving a decision by the Secretary of State to revoke the passport of an ex-CIA agent who was allegedly revealing classified information)

²⁹United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) (approval of presidential sanctions against defendant for selling arms to Bolivia.); United States v. Belmont

301 U.S. 324 (1937) (Roosevelt's settlement of property claims of Americans lost during Russian Revolution)

³⁰ Matthews v. Diaz, 426 U.S. 67 (1976) (the political branches need flexibility in dealing with the relationship between the country and its guests)

The Executive Order states that “military tribunals shall have exclusive jurisdiction” and that defendants “shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly..., in (i) any court of the United States, or any State thereof, ...” This appears to write out the federal courts generally and to exclude writs of habeas corpus³¹ in particular. Article III of the Constitution creates the federal judiciary. It establishes the Supreme Court and such other lower court that Congress “shall from time to time ordain and establish.”³² The judges of the Supreme Court and such lower courts are named by the President and approved by the Senate; they are protected by life tenure and against salary diminutions. Article I also allows Congress to “constitute tribunals.” Military courts, like territorial courts, bankruptcy courts, tax courts and magistrates sessions are Article I or legislative courts.³³ One’s right to proceed in an Article III court as opposed to an Article I court has spawned an extensive and often confusing caselaw.³⁴

In Crowell v. Benson³⁵ the Court reviewed an action which sought to enjoin an award of the United States Employee’s Compensation Commission as violative of Article III. The Court held that findings of fact by administrative agencies are acceptable under the Constitution as long as there remains an opportunity to have the jurisdictional facts and constitutional facts reviewed by an Article III Court.

³¹28 USC 2241

³²U.S. Constitution Art. III, sec 1

³³U.S. Constitution Art. I, Sec. 8.

³⁴Northern Pipeline Construction Co. v. Marathon Pipe Line Co. 458 U.S. 50 (1982) (Bankruptcy judges could not hear diversity of citizenship claim) Commodity Futures Trading Comm’n v. Schor 478 U.S. 833 (1986) (Commodity Futures Trading Comm’n which arbitrates claims of fraud against brokers can also hear counterclaims)

³⁵285 U.S. 22 (1932) See generally Paul Verkuil, Separation of Powers, the Rule of Law, and the Idea of Independence 30 Wm. & Mary L. Rev. 301 (1989)

In United States v. Raddatz ³⁶ the defendant, convicted of violation of federal firearms statutes, appealed because his motion to suppress was heard by a magistrate rather than an Article III judge. The Court affirmed because “the entire process takes place under the district court’s total control and jurisdiction.” ³⁷

Likewise in United States v. Mendoza-Lopez ³⁸ the Court reversed an order of deportation against an alien, who after being deported, was now being prosecuted for the crime of re-entry. The Court held that the failure to allow some meaningful Article III review of the defendant’s original deportation order required a reversal and remand. The Court stated, “Our cases establish that where a determination made in an administrative proceeding is to play a critical role in the subsequent imposition of a criminal sanction, there must be some meaningful review of the administrative proceeding” ³⁹. The Court continued, “This principle means, at the very least, that where the defects in an administrative proceeding foreclose judicial review of that proceeding, an alternative means of obtaining judicial review must be made available before the administrative order may be used to establish conclusively an element of a criminal offense.”

³⁶447 U.S. 667 (1980)

³⁷At 681

³⁸481 U.S. 828 (1987)

³⁹The Court there cited Estep v. United States, 327 U.S. 114, 121–122 (1946); Yakus v. United States, 321 U.S. 414, 444 (1944); cf. McKart v. United States, 395 U.S. 185, 196–197 (1969). In a subsequent footnote, n. 15, the Court explained its concern: “Even with this safeguard, the use of the result of an administrative proceeding to establish an element of a criminal offense is troubling. See United States v. Spector, 343 U.S. 169, 179 (1952) (Jackson, J., dissenting). While the Court has permitted criminal conviction for violation of an administrative regulation where the validity of the regulation could not be challenged in the criminal proceeding, Yakus v. United States, 321 U.S. 414 (1944), the decision in that case was motivated by the exigencies of wartime, dealt with the propriety of regulations rather than the legitimacy of an adjudicative procedure, and, most significantly, turned on the fact that adequate judicial review of the validity of the regulation was available in another forum. Under different circumstances, the propriety of using an administrative ruling in such a way remains an open question. We do not reach this issue here, however, holding that, at a minimum, the result of an administrative proceeding may not be used as a conclusive element of a criminal offense where the judicial review that legitimated such a practice in the first instance has effectively been denied.” At 838

Closely allied is the right to habeas corpus. ⁴⁰Historically the writ was always available to invoke a judicial inquiry into the causes of detention. Article I of the Constitution reserves to the legislature the power to suspend the privilege of the writ only in times of “rebellion or invasion.” Thus the writ preserves the role of the judiciary and validates all incarcerations and punishments. 41

I.N.S.v.St.Cyr ⁴²involved the deportation of a permanent alien because of conviction for drug offenses. I.N.S. argued before the Court that the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 divested the Court of jurisdiction to hear such claims challenging the legality of deportation orders. The Court implied that a government claim that a federal statute divested the Court of jurisdiction would run afoul of either Article III or the Suspension Clause: “In sum, even assuming that the Suspension Clause protects only the writ as it existed in 1789, there is substantial evidence to support the proposition that pure questions of law like the one raised by the respondent in this case could have been answered in 1789 by a common law judge with power to issue the writ of habeas corpus. It necessarily follows that a serious Suspension Clause issue would be presented if we were to accept the INS’ submission that the 1996 statutes have withdrawn that power from federal judges and provided no adequate substitute for its exercise. See Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362, 1395, 1397 (1953). The necessity of resolving such a serious and difficult constitutional issue and the desirability of avoiding that necessity simply reinforce the reasons for requiring a clear and unambiguous statement of constitutional intent.” ⁴³The Court traced its opinion back to Ex Parte Bollman ⁴⁴

⁴⁰See generally Eric Freedman, Habeas Corpus, Rethinking the Great Writ of Liberty (NYUPress, 2001)

⁴¹Paschal, The Constitution and Habeas Corpus 1970 Duke L.J. 605 (1970); Oaks, Legal History in the High Court - Habeas Corpus 64 Mich. L. Re. 451 (1966)

⁴²121 S. Ct. 2283 (2001)

⁴³at p. 2282

⁴⁴Footnote 24 states, “The dissent reads into Chief Justice Marshall’s opinion in Ex parte Bollman, 4 Cranch 75 (1807), support for a proposition that the Chief Justice did not endorse, either explicitly or implicitly. See post, at 1415. He did not do that the first Congress of the United States acted under the immediate influence of the injunction provided by the Suspension Clause when it gave life and activity to this great constitutional privilege in the Judiciary Act of 1789,

and that the writ could not be suspended until after the statute was enacted. 4 Cranch, at 95. That statement, however, surely does not imply that Marshall believed the Framers had drafted a Clause that would proscribe a temporary abrogation of the writ, while permitting its permanent suspension. Indeed, Marshall's comment expresses the far more sensible view that the Clause was intended to preclude any possibility that the privilege itself would be lost by either the inaction or the action of Congress. See, e.g., *ibid.* (noting that the Founders must have felt, with peculiar force, the obligation imposed by the Suspension Clause). Fn 24 at p 2281

Duncan v. Kahanamoku ⁴⁵ was petitions for the writ of habeas corpus from convictions in military tribunals in two consolidated cases that arose in Hawaii during martial law after the bombing of Pearl Harbor. Both were on behalf of civilians who were convicted of common law crimes unrelated to the war or to the military occupation. The Court was reluctant to allow a long standing state of martial law to continue to displace the writ. "We believe that when Congress passed the Hawaiian Organic Act and authorized the establishment of "martial law" it had in mind and did not wish to exceed the boundaries between military and civilian power, in which our people have always believed, which responsible military and executive officers had heeded, and which had become part of our political philosophy and institutions prior to the time Congress passed the Organic Act. The phrase "martial law" as employed in that Act, therefore, while intended to authorize the military to act vigorously for the maintenance of an orderly civil government and for the defense of the Islands against actual or threatened rebellion or invasion, was not intended to authorize the supplanting of courts by military tribunals. Yet the Government seeks to justify the punishment of both White and Duncan on the ground of such supposed congressional authorization. We hold that both petitioners are now entitled to be released from custody."⁴⁶

In Ex Parte Merryman ⁴⁷, the petitioner for the writ of habeas corpus was a lieutenant in the secessionist company who was allegedly ready to cooperate with the rebel to take Maryland for the south. General Keim of the Union Army had him arrested and held at Fort McHenry in Maryland. The petition was presented to Chief Justice Taney, sitting as Circuit Justice for the Maryland District. Taney issued the writ to General Cadwalader, the chief officer at Fort McHenry and here refused to either respond or to deliver up the prisoner. Taney therefore wrote an opinion stating the illegality of the detention but admitting that he could do nothing about it. ⁴⁸

⁴⁵327 U.S. 304 (1946)

⁴⁶Id at p. 324

⁴⁷17 F. Cas 144 (1861)

⁴⁸ "In such a case, my duty was too plain to be mistaken. I have exercised all the power which the constitution and laws confer upon me, but that power has been resisted by a force too strong for me to overcome. It is possible that the officer who has incurred this grave responsibility may have misunderstood his instructions, and exceeded the authority intended to be given him; I shall, therefore, order all the proceedings in this case, with my opinion, to be filed and recorded in the circuit court of the United States for the district of Maryland, and direct

the clerk to transmit a copy, under seal, to the president of the United States. It will then remain for that high officer, in fulfillment of his constitutional obligation to "take care that the laws be faithfully executed," to determine what measures he will take to cause the civil process of the United States to be respected and enforced." 17 F. Cas. 144, at 153

The Chief Justice was clear that the refusal by the military to respond to the writ was serious and that any suspension of the writ either by the military or by the president himself was without authority in the Constitution. The power to suspend the writ is the power of Congress. The Court was clear that since the time of the Magna Carta, English speaking people had no toleration for executive suspension of the writ.⁵⁰

49

In Ex Parte Milligan⁵¹ Milligan petitioned the federal circuit court in Indiana for a writ of habeas corpus seeking freedom from military custody following his conviction and sentence to death by a military tribunal. He had allegedly been an Indiana Copperhead who helped organize a pro-Southern group called the Order of American Knights, who had plotted an armed uprising in Indiana and sought Confederate military assistance.⁵²

⁴⁹“The clause of the constitution, which authorizes the suspension of the privilege of the writ of habeas corpus, is in the 9th section of the first article. This article is devoted to the legislative department of the United States, and has not the slightest reference to the executive department.” at p. 148.

⁵⁰“The right of the subject to the benefit of the writ of habeas corpus, it must be recollected, was one of the great points in controversy, during the long struggle in England between arbitrary government and free institutions, and must therefore have strongly attracted the attention of the statesmen engaged in framing a new and, as they supposed, a freer government than the one which they had thrown off by the revolution. From the earliest history of the common law, if a person were imprisoned, no matter by what authority, he had a right to the writ of habeas corpus, to bring his case before the king's bench; if no specific offence were charged against him in the warrant of commitment, he was entitled to be forthwith discharged; and if an offence were charged which was bailable in its character, the court was bound to set him at liberty on bail. The most exciting contests between the crown and the people of England, for the time of Magna Charta, were in relation to the privilege of this writ, and they continued until the passage of the statute of 31 Car. II., commonly known as the great habeas corpus act.”

⁵¹71 U.S., 2 (1866)

⁵²Michal R. Belnap, The Supreme Court Goes to War: The Meaning and Implications of the Nazi Saboteur Case 89 Military Law Review 56 (1980)

United States defended the actions of the Military Tribunal. It had been constituted by the Commander-in-Chief during a war when martial law was in effect. President Lincoln had issued a proclamation in 1862, declaring criminal “all rebels, and insurgents, their raiders and abettors, within the United States and all persons discouraging volunteer enlistments, resisting militia drafts or guilty of any disloyal practice... shall be subject to martial law, and liable to trial and punishment by courts martial or military commission.”⁵³ In finding Milligan guilty, the Commission denied that it had an obligation to justify its action in a civilian court: it first invoked an Act Relating to Habeas Corpus, and Regulating Judicial Proceedings in Certain Cases, enacted by Congress in 1863 at the behest of President Lincoln, which authorized “the suspension, during the rebellion, of the writ of habeas corpus, throughout the United State, by the President.”⁵⁴ Secondly, the Government invoked Lincoln’s proclamation of September 15, 1864⁵⁵ suspending habeas corpus for persons held in custody of the United States, as “Prisoners of war, spies, or aiders and abettors of the enemy, ... or otherwise amenable to military law, or the rules or articles of war, ... or for any other offense against the military or naval service.”

After conviction, Milligan petitioned for a writ of habeas corpus. The Circuit Court in Indiana certified the question to the Supreme Court: “1st. ‘On the facts stated in said petition and exhibits, ought a writ of habeas corpus to be issued?’ 2d. ‘On the facts stated in said petition and exhibits, ought the said Lambdin P. Milligan to be discharged from custody as in said petition prayed?’ 3d. ‘Whether, upon the facts stated in said petition and exhibits, the military commission mentioned therein had jurisdiction legally to try and sentence said Milligan in manner and form as in said petition and exhibits is stated?’”⁵⁶

⁵³71 U.S. 15 -6 Argument for the United States

⁵⁴ Act of March 3d, 1863, sec. 1 see Milligan, supra, p. 4.

⁵⁵ 13 Stat. At Large, 734

⁵⁶71 U.S. 108 -9

The argument in the Supreme Court was dramatic indeed: ⁵⁷ Milligan was represented by James A. Garfield, subsequently President of the United States, David Dudley Field, subsequently Justice on the Supreme Court, Jeremiah S. Black, Attorney General during the Buchanan Administration and formerly justice on the Pennsylvania Supreme Court, and Joseph E. MacDonald, former Congressman, state attorney general and 1864 candidate for Governor of Indiana (for which Milligan was also a candidate) ⁵⁸. The government was represented by the Attorney General himself, Henry Stansbery, Benjamin F. Butler, a Civil War Hero and and James Speed, subsequently Attorney General. The summaries of the oral arguments in the United States Reports are over 100 pages, most for the petitioners.

⁵⁷ William Rehnquist, All the Laws But One: Civil Liberties in Wartime (1998) p. 118.

⁵⁸ Charles Fairman, History of the Supreme Court of the United States Vol VI, p 196 et seq. (Fairman also recounts that John Wilkes Booth and his seven conspirators in the assassination of President Lincoln were also tried and convicted by a military tribunal, four of the eight receiving the death penalty) at 197.

The lengthy opinion, written by Justice Davis, a 1862 Lincoln appointee, surveyed English history⁵⁹, Pre-Revolutionary history, the Framing of the Constitution, ⁶⁰the practices in previous wars to find that the writ was available to Milligan. The Court then proceeded to ask whether “any of the rights guaranteed by the Constitution had been violated in the case of Milligan? and if so, what are they?” ⁶¹First, and foremost the Court found that the military commission was without authority to try Milligan because it was not an article III court. ⁶²The Court rejected the argument

⁵⁹“From the first year of the reign of Edward the Third, when the Parliament of England reversed the attainder of the Earl of Lancaster, because he could have been tried by the courts of the realm, and declared, “that in time of peace no man ought to be adjudged to death for treason or any other offence without being arraigned and held to answer; and that regularly when the king’s courts are open it is a time of peace in judgment of law,” down to the present day, martial law, as claimed in this case, has been condemned by all respectable English jurists as contrary to the fundamental laws of the land, and subversive of the liberty of the subject.” at 128

⁶⁰“Time has proved the discernment of our ancestors; for even these provisions, expressed in such plain English words, that it would seem the ingenuity of man could not evade them, are now, after the lapse of more than seventy years, sought to be avoided. Those great and good men foresaw that troublous times would arise, when rules and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority.” at p. 120

⁶¹71 U.S. at 121

⁶²Every trial involves the exercise of judicial power; and from what source did the military commission that tried him derive their authority? Certainly no part of the judicial power of the country was conferred on them; because the Constitution expressly vests it “in one supreme court and such inferior courts as the Congress may from time to time ordain and establish,” and it is not pretended that the commission was a court ordained and established by Congress. They cannot justify on the mandate of the President; because he is controlled by law, and has his appropriate sphere of duty, which is to execute, not to make, the laws; and there is “no written criminal code to which resort can be had as a source of jurisdiction.” at 121.

that military commissions were appropriate under the laws of war. ⁶³ Nor did the President's power as commander in chief justify the use of these commissions. ⁶⁴ The Court then reviewed the nature

⁶³“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 it to 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.” at 121.

⁶⁴ It is claimed that martial law covers with its broad mantle the proceedings of this military commission. The proposition is this: that in a time of war the commander of an armed force (if in his opinion the exigencies of the country demand it, and of which he is to judge), has the power, within the lines of his military district, to suspend all civil rights and their remedies, and subject citizens as well as soldiers to the rule of his will; and in the exercise of his lawful authority cannot be restrained, except by his superior officer or the President of the United States.

If this position is sound to the extent claimed, then when war exists, foreign or domestic, and the country is subdivided into military departments for mere convenience, the commander of one of them can, if he chooses, within his limits, on the plea of necessity, with the approval of the Executive, substitute military force for and to the exclusion of the laws, and punish all persons, as he thinks right and proper, without fixed or certain rules. The statement of this proposition shows its importance; for, if true, republican government is a failure, and there is an end of liberty regulated by law. Martial law, established on such a basis, destroys every guarantee of the Constitution, and effectually renders the “military independent of and superior to the civil power” -- the attempt to do which by the King of Great Britain was deemed by our fathers such an offence, that they assigned it to the world as one of the causes which impelled them to declare their independence. Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish. For this, and other equally weighty reasons, they secured the inheritance they had fought to maintain, by incorporating in a written constitution the safeguards which time had proved were essential to its preservation. Not one of these safeguards can the President, or Congress, or the Judiciary disturb, except the one concerning the writ of habeas corpus.

It is essential to the safety of every government that, in a great crisis, like the one we have just passed through, there should be a power somewhere of suspending the writ of habeas corpus. In every war, there are men of previously good character, wicked enough to counsel their fellow-citizens to resist the measures deemed necessary by a good government to sustain its just authority and overthrow its enemies; and their influence may lead to dangerous combinations. In the emergency of the times, an immediate public investigation according to law may not be

of martial law and the locales where it may be appropriate and under what kinds of military constraints.⁶⁵ Indeed these very rules were followed during the Revolutionary War. ⁶⁶The Court held that the assertion of the jurisdiction of a military tribunal against a civilian in a state where the civilian courts were open and operative was a usurpation of Article III authority. The concurring four justices were a bit more temperate. Congress certainly has the power to create military

possible; and yet, the peril to the country may be too imminent to suffer such persons to go at large. Unquestionably, there is then an exigency which demands that the government, if it should see fit in the exercise of a proper discretion to make arrests, should not be required to produce the persons arrested in answer to a writ of habeas corpus. The Constitution goes no further. . . . But, it is insisted that the safety of the country in time of war demands that this broad claim for martial law shall be sustained. If this were true, it could be well said that a country, preserved at the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation. Happily, it is not so.” at p. 125 -6.

⁶⁵ It will be borne in mind that this is not a question of the power to proclaim martial law, when war exists in a community and the courts and civil authorities are overthrown. Nor is it a question what rule a military commander, at the head of his army, can impose on states in rebellion to cripple their resources and quell insurrection. . . . Martial law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such a effectually close the courts and deposes the civil administration.

It follows, from what has been said on this subject, that there are occasions when martial rule can be properly applied. 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.” at p. 126

⁶⁶“So sensitive were our Revolutionary fathers on this subject, although Boston was almost in a state of siege, when General Gage issued his proclamation of martial law, they spoke of it as an attempt to supersede the course of the common law, and instead thereof to publish and order the use of martial law.” The Virginia Assembly, also, denounced as a similar measure on the part of Governor Dunmore “an assumed power, which the king himself cannot exercise; because it annuls the law of the land and introduces the most execrable of all systems, martial law.

In some parts of the country, during the war of 1812, our officers made arbitrary arrests and, by military tribunals, tried citizens who were not in the military service. These arrests and trials, when brought to the notice of the courts, were uniformly condemned as illegal.” at p. 128

tribunals and the Fifth Amendment specifically assert that constitutional rights in such courts are more restricted,⁶⁷ but ultimately the application of such jurisdiction in this case was unjustified.

⁶⁷“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.” at 139 -140

The decision in Milligan gave hope to the opponents of reconstruction in the South. After the Civil War, military rule was established in the defeated southern states and the conventional criminal law was enforced through military tribunals, which were predictably unpopular. Milligan gave rise to numerous attempts to have the Supreme Court invalidate the regime of military law and tribunals.⁶⁸ These attempts led to some bizarre results including Ex Parte McCardle⁶⁹, wherein, after a military trial of a newspaper editor for writing articles critical of the military government, the convicted prisoners sought habeas corpus from a lower federal court. He appealed the refusal to the Supreme Court and after oral argument, Congress withdrew the appellate jurisdiction of the court to hear the case. The Court acceded to the withdrawal. Ex Parte Yerger⁷⁰ sought to invoke the original jurisdiction of the Supreme Court to inquire in the military tribunal conviction for murder of Yerger. But again decision on the merits was avoided when the defendant's custody was interrupted.

Ex Parte Quirin⁷¹ was a petition for the writ of habeas corpus brought by one Quirin and seven others. On writ of certiorari to the Court of Appeals for the District of Columbia, before that court could review the denial of the writ of habeas corpus by the district court, the facts were stipulated⁷² The petitioners were born in Germany; all have lived in the United States. All returned to Germany between 1933 and 1941. All except petitioner Haupt are admittedly citizens of the German Reich, with which the United States was at war. Haupt came to this country with his parents when he was five years old; he assumedly became a citizen of the United States by virtue of the naturalization of his parents during his minority and that he has not since lost this citizenship, although the Government contended that he renounced or abandoned his United States citizenship by his conduct.

After the declaration of war between the United States and the German Reich, petitioners received training at a sabotage school near Berlin, Germany, where they were instructed in the use

⁶⁸Eric Foner Reconstruction 1863 -1877(New York, Harper and Row Publishers, 1988) p.272.

⁶⁹7Wall.506(1869)

⁷⁰8Wall.85(1868)

⁷¹317U.S.1(1942)

⁷²317USat20etseq.

of explosives and in methods of secret writing. Thereafter petitioners, with a German citizen, Dasch, proceeded from Germany to a seaport in Occupied France, where petitioners Burger, Heinck and Quirin, together with Dasch, boarded a German submarine which proceeded across the Atlantic to Amagansett Beach on Long Island, New York. The four were there landed from the submarine in the hours of darkness, on or about June 13, 1942, carrying with them a supply of explosives, fuses, and incendiary and timing devices. While landing they wore German Marine Infantry uniforms or parts of uniforms. Immediately after landing they buried their uniforms, and proceeded in civilian dress to New York City.

The remaining four petitioners at the same French port boarded another German submarine, which carried them across the Atlantic to Ponte Vedra Beach, Florida. On or about June 17, 1942, they came ashore during the hours of darkness, wearing caps of the German Marine Infantry. They proceeded in civilian dress to Jacksonville, Florida, and thence to various points in the United States. All were taken into custody in New York or Chicago by agents of the Federal Bureau of Investigation. All had received instructions in Germany from an officer of the German High Command to destroy war industries and war facilities in the United States, for which they would be paid.

President Roosevelt, by order of July 2, 1942, appointed a Military Commission and directed it to try petitioners for offenses against the law of war. On the same day, by Proclamation, the President declared that "all persons who are subjects, citizens or residents of any nation at war with the United States or who give obedience or act under the direction of any such nation, and who during time of war enter or attempt to enter the United States... through coastal or boundary defenses, and are charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violation of the law of war, shall be subject to the law of war and to the jurisdiction of military tribunals."

On July 3, 1942, the Judge Advocate General's Department of the Army charged the defendants with various violations of the law of war. The Commission met on July 8, 1942, and proceeded with the trial until July 27. Petitions for certiorari and for habeas corpus were filed in the Supreme Court and the Court, in special session, heard arguments on July 29 and 30. It issued a short per curiam opinion on July 31. The defendants were electrocuted on August 8 swift justice indeed. A full opinion was issued three months later in October 29, 1942.

Before the Supreme Court the petitioners disputed the President's power to create military tribunals to try them for the offenses charged. They claimed a right to be tried in the civil courts with the full protections of the Fifth and Sixth Amendments. The government countered that the Petitioners were "enemy aliens [who have] entered the country as enemy belligerents" ⁷³

The Court cited the President's power as Commander-in-Chief of the military and Congress's numerous powers with respect to the military. ⁷⁴ The Court described the President's power to wage war. ⁷⁵ The Court found further authority for military tribunals in statutes that provide for the government of the military ⁷⁶

⁷³ At p. 24.

⁷⁴ "Congress and the President, like the courts, possess no power not derived from the Constitution. But one of the objects of the Constitution, as declared by its preamble, is to "provide for the common defense." As a means to that end, the Constitution gives to Congress the power to "provide for the common Defense," Art. I, § 8, cl. 1; "To raise and support Armies," "To provide and maintain a Navy," Art. I, § 8, cl. 12, 13; and "To make Rules for the Government and Regulation of the land and naval Forces," Art. I, § 8, cl. 14. Congress is given authority "To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water," Art. I, § 8, cl. 11; and "To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations," Art. I, § 8, cl. 10. And finally, the Constitution authorizes Congress "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Art. I, § 8, cl. 1." at p. 26

⁷⁵ "The Constitution confers on the President the "executive Power," Art. II, § 1, cl. 1, and imposes on him the duty to "take Care that the Laws be faithfully executed." Art. II, § 3. It makes him the Commander in Chief of the Army and Navy, Art. II, § 2, cl. 1, and empowers him to appoint and commission officers of the United States. Art. II, § 3, cl. 1. The Constitution thus invests the President, as Commander in Chief, with the power to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces, and all laws defining and punishing offenses against the law of nations, including those which pertain to the conduct of war." at p. 26.

⁷⁶ By the Articles of War, 10 U.S.C. §§ 1471-1593, Congress has provided rules for the government of the Army. It has provided for the trial and punishment, by courts martial, of violations of the Articles by members of the armed forces and by specified classes of persons associated or serving with the Army. Arts. 1, 2. But the Articles also recognize the "military commission" appointed by military command as an appropriate tribunal for the trial and punishment of offenses against the law of war not ordinarily tried by court martial. See Arts.

12, 15. Articles 38 and 46 authorize the President, with certain limitations, to prescribe the procedure for military commissions. Articles 81 and 82 authorize trial, either by court martial or military commission, of those charged with relieving, harboring or corresponding with the enemy and those charged with spying. And Article 15 declares that "the provisions of these articles conferring jurisdiction upon courts martial shall not be construed as depriving military commissions... 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... or other military tribunals." Article 2 includes among those persons subject to military law the personnel of our military establishment. But this, as Article 12 provides, does not exclude from that class "any other person who by the law of war is subject to trial by military tribunals" and who under Article 12 may be tried by court martial or under Article 15 by military commission, cited at p. 26

Next, the Court asked whether the charges against the defendants are of the genus of offense triable before a military tribunal. The Court found that Congress had, by reference, recognized international law and law of war. These laws recognize a distinction between armed forces and the peaceful populations of belligerent nations, between lawful and unlawful combatants. Unlawful combatants are subject to trial and punishment by military tribunals.⁷⁷ Here the Court inserted a lengthy footnote detailing General Washington's trial of Major John Andre of the British Army in the Revolutionary War, as well as examples from the Mexican War and the Civil War. Lawful combatants, on the other hand, are subject to capture and detention as prisoners of war. The Court found that specification 1⁷⁸ lodged against the petitioners clearly alleged conduct making them unlawful combatants. The fact that one of the defendants may have been a citizen of the United States does not change his status of unlawful combatant.⁷⁹

The Court seemed to ignore Milligan's holding that Article III section 2 requirement of jury trial and the protections of the Fifth and Sixth Amendments were fully applicable. Milligan further would never have tolerated the use of military tribunals in the United States where the civilian courts were fully operable.

Application of Yamashita⁸⁰ was a petition for the writ of habeas corpus from the Commanding General of the Fourteenth Army Group of the Imperial Japanese Army in the Philippine Islands, who surrendered to and became a prisoner of war of the United States Army

⁷⁷“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.” p.31

⁷⁸Specification I states that petitioners, "being enemies of the United States and acting for...the German Reich, a belligerent enemy nation, secretly and covertly passed, in civilian dress, contrary to the law of war, through the military and naval lines and defenses of the United States...and went behind such lines, contrary to the law of war, in civilian dress...for the purpose of committing...hostile acts, and, in particular, to destroy certain war industries, war utilities and war materials within the United States."

⁷⁹Ex Parte Bollman 8 U.S. 75 (1807) On writ of habeas corpus prisoner charged with treason should be discharged if upon review of the evidence it appears insufficient.

⁸⁰321 U.S. 1 (1946)

Forces. Hewas then charged as a war criminal, tried before a military commission, convicted and sentenced to be hanged. The Petitioner attacked the jurisdiction of the tribunal and also the offense charged which placed responsibility upon the general for failing to control his troops who committed atrocities in the Philippines. The Court found the charge to be sanctioned by "the system of military common law applied by military tribunals." The Court suggested that military commissions are reviewable only by higher military authority and not by the courts. "Congress conferred on the courts no power to review their determinations save only as it has granted judicial power" to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty." 28 U.S.C. §§ 451, 452

Justice Murphy dissented. He stated that "The Fifth Amendment guarantee of due process of law applies to "any person" who is accused of a crime by the Federal Government or any of its agencies. 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. "Indeed, such an exception would be contrary to the whole philosophy of human rights which makes the Constitution the great living document that it is. The immutable rights of the individual, including those secured by the due process clause of the Fifth Amendment, belong not alone to the members of those nations that excel on the battlefield or that subscribe to the democratic ideology. They belong to every person in the world, victor or vanquished, whatever may be his race, color or beliefs. They rise above any status of belligerency or outlawry. They survive any popular passion or frenzy of the moment. No court or legislature or executive, not even the mightiest army in the world, can ever destroy them. Such is the universal and indestructible nature of the rights which the due process clause of the Fifth Amendment recognizes and protects when life or liberty is threatened by virtue of the authority of the United States."

Johnson v. Eisenstrager⁸¹ was a petition for the writ of habeas corpus from German nationals who were convicted of crimes in trials before military tribunals. After the surrender of Germany, the defendants remained in China and supplied military intelligence to Japan concerning the American military. After trial held in China under American Command the convicts were returned to American military authorities in Germany where they were incarcerated during United States occupation of Germany after World War II. The Court described the petitioners as "enemy

⁸¹339 U.S. 763 (1950)

aliens, resident, captured and imprisoned a broad,” whose “standing to demand access to our courts.”⁸² The Court acknowledged that the “privilege of litigation has been extended to aliens, whether friendly or enemy,” because “their presence in the country implied protection.” These petitioners, however, “at no relevant time were within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States.”⁸³

⁸²Id. at p. 776. Petitioner seeks the writ “even though he (a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States.” at p. 777.

⁸³Id. at p. 778.

The Court cited Ludecke v. Watkins,⁸⁴ for the proposition that the resident enemy alien is constitutionally subject to summary arrest, internment and deportation whenever a "declared war" exists. Courts will entertain his plea for freedom from Executive custody only to ascertain the existence of a state of war and whether he is an alien enemy and so subject to the Alien Enemy Act. Once these jurisdictional elements have been determined, courts will not inquire into any other issue as to his internment.

⁸⁴Ludecke v. Watkins, 335 U.S. 160 (1948) was an appeal from the denial of the writ of habeas corpus on behalf of a German national who was about to be deported under the Alien Enemy Act of 1938 and giving the President broad power since time of war to investigate and deport non-citizen nationals of a country with whom the United States is at war. The Court reasoned that: "The political branch of the Government has not brought the war with Germany to an end. On the contrary, it has proclaimed that 'a state of war still exists.... The Court would be assuming the functions of the political agencies of the Government to yield to the suggestion that the unconditional surrender of Germany and the disintegration of the Nazi Reich have left Germany without a government capable of negotiating a treaty of peace. It is not for us to question belief by the President that enemy aliens who were justifiably deemed fit subjects for internment during active hostilities do not lose their potency for mischief during the period of confusion and conflict which is characteristic of a state of war even when the guns are silent but the peace of Peace has not come. These are matters of political judgment for which judges have neither the technical competence nor official responsibility.'" At 170

The Court in Johnson concluded under the rule of the common law and the law of nations, alien enemies resident in the country of the enemy could not maintain an action in its courts during the period of hostilities”⁸⁵ The Court continued, “To grant the writ to these prisoners might mean that our army must transport them across these seas for hearing. This would require allocation of shipping space, guarding personnel, billeting and rations. It might also require transportation for whatever witnesses the prisoners desired to call as well as transportation for those necessary to defend legality of the sentence. The writ, since it is held to be a matter of right, would be equally available to enemies during active hostilities as in the present twilight between war and peace. Such trials would hamper the war effort and bring aid and comfort to the enemy.” at 779⁸⁶ The Court had difficulty distinguishing Yamashita, however, whose conviction was reviewed, although never present in the United States. The Court suggested that the Philippines were a special case because of a protectorate relationship. The Court also cited Hirota v. MacArthur⁸⁷ which denied the writ to Japanese, charged, tried and incarcerated in Japan.

How do all these cases bear on our question of the abrogation of Article III Courts and of the writ of habeas corpus under the President’s Executive Order? St. Cyr states that a abrogation of Article III powers will be viewed unfavorably by the Court. Duncan suggests that even in times of declared martial law, the Courts may see fit to impose civilian rule. Milligan suggests that civilian courts will always be available to issue writs of habeas corpus. Yamashita allows trial by a military tribunal for an “illegal combatant” who is captured outside of the United States, although his right to petition for the writ is preserved. Johnson suggests that the writ does not extend to the illegal combatants captured in China and incarcerated in Germany. Ludecke allows for the executive deportation of an alien of a country with which the United States is officially at war.

⁸⁵at 783. Here the Court cited the following law review articles: Borchard, The Right of Alien Enemies to Sue in Our Courts, 27 Yale L.J. 104; Gordon, The Right of Alien Enemies to Sue in American Courts, 36 Ill. L. Rev. 809, 810; Battle, Enemy Litigants in Our Courts, 28 Va. L. Rev. 429; Rylee, Enemy Aliens as Litigants, 12 Geo. Wash. L. Rev. 55, 65; Notes, 5 U. of Detroit L.J. 106, 22 Neb. L. Rev. 36, 30 Calif. L. Rev. 358, 54 Harv. L. Rev. 350.

⁸⁶“Such a construction would mean that during military occupation irreconcilable enemy elements, guerrilla fighters, and “werewolves” could require the American Judiciary to assure them freedoms of speech, press, and assembly as in the First Amendment, right to bear arms as in the Second, security against “unreasonable” searches and seizures as in the Fourth, as well as right to jury trial as in the Fifth and Sixth Amendments”. At 784

⁸⁷335 U.S. 876 (1948)

Quirin utilizes the writ to thoroughly review the petitioner's claims. Quirin is thus consistent with St. Cyr, Duncan, and Yamashita and Milligan. The writ is available to anyone incarcerated in the United States and will serve to inquire into the adequacy of any Military tribunal held in the United States. This would include illegal combatants from a nation against whom the United States has declared war, who violated the territorial integrity of the United States. Habeas would not be available to combatants of a foreign country who were tried overseas for crimes committed overseas. Legal residents of the United States would clearly have access to the writ.

Use of Military Tribunals

The related question in most of the cases cited is the appropriateness of trial before a military tribunal. Application of the President's Order against conspirators of the September 11 events seems similar to Quirin. Both involve foreign terrorists who are armed to hit civilian targets. A difference is that on September 11 the United States was not at war with anyone and at least some of the perpetrators of September 11 were here legally. Questions arise as to whether the September 11 perpetrators are illegal invaders; are they combatants; does the fact that they claim no allegiance to any particular country and are they loosely associated with Afghanistan matter? These questions will require further inquiry in a specific case.

The Order has not yet been invoked against any potential defendant. Thus ruminating about the Order's impact against any particular group is a bit hypothetical. The Order applies to the whole world's population except American citizens, living within the United States or abroad. However, the Order would appear to extend to several different categories of person: (1) prisoners of war captured in Afghanistan and held overseas; (2) unlawful combatants captured or arrested outside the United States and held overseas; (3) groups (1) or (2), except that they are held in the United States (4) illegal aliens in the United States, including those who overstayed their visas; (5) legal aliens. ⁸⁸ Yet another category may be required for those held at Guantanamo Bay. The first category are combatants and the second are spies and saboteurs. The laws of war and the Geneva conventions apply to prisoners of war and to lesser extent to illegal combatants. The last

89

⁸⁸ Aryeh Neier, The Military Tribunal on Trial New York Review of Books Feb. 14, 2002, p. 11 et seq.

⁸⁹ Coalition of Clergy v. George Walker Bush (DC, CA) Civ. No. 02-570. Order Dismissing Petition for Writ of Habeas Corpus, which, somewhat incredibly, finds that Cuba maintains sovereignty over Guantanamo Bay. Feb. 21, 2002

two categories have Constitutional rights, ⁹⁰ although Congress has extensive powers over immigration and naturalization. ⁹¹ Zadvydas v. Davis ⁹² held that the Due Process clause of the Fifth Amendment applies to illegal aliens. ⁹³

⁹⁰Plyler v. Doe 457 U.S. 202 (1982) (the equal protection clause prohibits the exclusion of the children of illegal immigrants from Texas public schools. (Discuss differences between exclusion and non-entry))

⁹¹Matthews v. Diaz 426 U.S. 96 (1976) (Congress may condition eligibility for federal medical insurance on admission to permanent residence); Haig v. Agee 453 U.S. 280 (1981) (Secretary of State has broad discretion to withdraw passports from those who damage U.S. foreign policy) Graham v. Richardson 403 U.S. 365 (1971) (Classifications based on alienage are suspect)

⁹²121 S.Ct. 2491 (2001) (The petitioner, a legally admitted Lithuanian, whose criminal record made him subject to deportation, was detained after the statutorily authorized removal period because immigration authorities could find no country who would accept the petitioner. The Court made clear that the petitioner can file a writ of habeas corpus and that he is entitled to the protections of the Due Process Clause)

⁹³The Court cites and follows Wong Wing v. United States 163 U.S. 228 (1896) in invalidating a statute that authorized hard labor on aliens awaiting deportations; the Court distinguished Shaughnessy v. United States ex rel. Mezei 345 U.S. 206 (1953) who was denied habeas corpus because he was detained indefinitely at Ellis Island

The offense targeted by the order is terrorism. It applies to members of Al Qaida and perpetrators of terrorism, as well as the raiders, abettors and harborers. Terrorism is not defined in the order. The dictionary defines terrorism as the systematic use of terror which is defined as: “violence committed by groups in order to intimidate a population or government into granting their demands.”⁹⁴ The order includes objectives that perpetrators have as their aim to “cause, injury to or adverse effect on the United States, its citizens, national security, foreign policy, or economy.”⁹⁵ While the definition covers the bombing of embassies, the language is broad enough to cover violence at recent demonstrations in cities where the World Trade Organization has held meeting. It might apply to financial supporters of the Irish Republican Army or groups in the Middle East.

⁹⁴ Merriam-Webster Online Dictionary. www.merriam-webster.com/home

⁹⁵ Executive Order Appendix Sec 2(a)(ii)

What we do know is that over 1000 people have been apprehended, held and questioned pursuant to the Order. They have been turned over to the Department of Defense by Immigration and Naturalization. ⁹⁶The “reason to believe” standard in the Order is vague and seems to invite fierce consequences including secret detention and suspension of constitutional rights on what sounds like whim, suspicion or supposition. It also falls short of the Fourth Amendment requirement of “probable cause.” ⁹⁷Section one of the Order states: that “it is not practicable ⁹⁸to apply in military commissions under this order the principles of law and the rules of evidence ⁹⁹generally recognized in the trial of criminal cases in the United States district courts.” ¹⁰⁰This statement covers a great deal of law including the Fourth, Fifth, Sixth and Eighth Amendments as well as the presumption of innocence and proof beyond reasonable doubt. But ultimately Quirin would authorize these suspension with respect to illegal combatants.

The Reach of the Constitution

⁹⁶Association of the Bar of the City of New York, Report on the President’s military Order of November 13, 2001 Regarding Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism www.abcnny.org p.5.

⁹⁷Draperv. United States 358 U.S. 307 (1959) (arrest requires probable cause)

⁹⁸Many a prosecutor over the years has felt that adherence to the Constitutional rights of the accused is not “practicable.”

⁹⁹USA Patriots Act of 2001 H.R. 3162 (a comprehensive statute to expand the powers of law enforcement agencies to investigate and prosecute terrorism.)

¹⁰⁰This provision reverses para. 2(b)(2) of the Preamble of the Manual for Courts Martial which suggests that military tribunals be guided by principles of law applicable to courts martial. Most of the Constitution and Rules of Evidence apply in courts -martial.

Persons captured in Afghanistan who are recurrently being held at Guantanamo Bay, (about whom much has been said concerning their status as prisoners of war under the Geneva Conventions¹⁰¹ (entitling them to certain minimum standards of confinement) may be candidates for trials before military tribunals - if illegal combatants, trials before military tribunals; if enemy prisoners of war, trials before courts - martial.

¹⁰¹“A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

1. Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.
2. Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if that territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
 - (a) That of being commanded by a person responsible for his subordinates;
 - (b) That of having a fixed distinctive sign recognizable at a distance;
 - (c) That of carrying arms openly;
 - (d) That of conducting their operations in accordance with the laws and customs of war.
3. Members of regular armed forces who profess allegiance to a government or authority not recognized by the Detaining Power.
4. Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.
5. Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.
6. Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

B. The following shall likewise be treated as prisoners of war under the present Convention:

1. Persons belonging, or having belonged, to the armed forces of the occupied country, if the occupying Power considers it necessary by reason of such allegiance to intern them, even though it has originally liberated them while hostilities were going on outside the territory it occupies, in particular where such persons have made an unsuccessful attempt to rejoin the armed forces to which they belong and which are engaged in combat, or where they fail to comply with a summons made to them with a view to internment. Geneva III 75 U.N.T.S. 135, 6 U.S.T. 3316 signed 12 August 1949, entered into force 21 October 1950. Sec. 4.

If Quirin's rule applies, (and not the Milligan rule) the trial before the military tribunal will not be constrained by the Fourth, Fifth and Sixth Amendments. If tried before a court-martial, the Constitution will apply, although not jury trial and grand jury. This raises the question of the applicability of the Constitution outside of the territorial limits of the United States. In United States v. Verdugo -Urquidez¹⁰² the Court was asked to rule on the validity of a search conducted in Mexico. The defendant was an alleged drug kingpin who operated wholly out of Mexico, but whose network imported illegal drugs into the United States. He was indicted by a federal grand jury sitting in California. An arrest warrant was issued and he was arrested by Mexican police and delivered to the border and taken into federal custody. Subsequently federal DEA agents searched two of the defendant's residences in Mexico and seized evidence. At trial the defendant moved to suppress the evidence seized in the warrantless search in Mexico. The Court investigated the extraterritorial reach of the Constitution. ¹⁰³ The Courts reviewed the language and the history of

¹⁰²494 U.S. 259 (1990)

¹⁰³“The global view taken by the Court of Appeals of the application of the Constitution is also contrary to this Court's decisions in the Insular Cases, which held that not every constitutional provision applies to governmental activity even where the United States has sovereign power. See, e.g., Balzac v. Porto Rico, 258 U.S. 298 (1922) (Sixth Amendment right to jury trial inapplicable in Puerto Rico); Ocampo v. United States, 234 U.S. 91 (1914) (Fifth Amendment grand jury provision inapplicable in Philippines); Dorr v. United States, 195 U.S. 138 (1904) (jury trial provision inapplicable in Philippines); Hawaii v. Mankichi, 190 U.S. 197 (1903) (provisions on indictment by grand jury and jury trial inapplicable in Hawaii); Downes v. Bidwell, 182 U.S. 244 (1901) (Revenue Clauses of Constitution inapplicable to Puerto Rico). In Dorr, we declared the general rule that in an unincorporated territory - one not clearly destined for statehood - Congress was not required to adopt “a system of laws which shall include the right of trial by jury, and that the Constitution does not, without legislation and of its own force, carry such right to territory so situated.” 195 U.S., at 149 (emphasis added). Only “fundamental” constitutional rights are guaranteed to inhabitants of those territories. Id., at 148; Balzac, *supra*, at 312 -313; see Examining Board of Engineers, Architects and Surveyors v. Flores de Otero, 426 U.S. 572, 599, n.30 (1976). If that is true with respect to territories ultimately governed by Congress, respondent's claim that the protections of the Fourth Amendment extend to aliens in foreign nations is even weaker. And certainly, it is not open to us in light of the Insular Cases to endorse the view that every constitutional provision applies wherever the United States Government exercises its power.” at p. 268.

the Fourth Amendment and concluded that it had no application outside of the borders of the United States.¹⁰⁴

In United States ex rel. Toth v. Quarles¹⁰⁵, after Toth was discharged from the Air Force and had taken up civilian life, he was arrested by military authorities and transported back to Korea for court martial for murder that occurred while he was in the military. The Court, per Black, stated that Toth had a right to an Article III jury trial and that a n argument arising out of Congress' spowertomakeregulationsconcerningthemilitary,couldnotextendtopersons discharged.¹⁰⁶

¹⁰⁴The Court concluded: "For better or for worse, we live in a world of nations - states in which our Government must be able to "functio[n] effectively in the company of sovereign nations." Perez v. Brownell, 356 U.S. 44, 57 (1958). Some who violate our laws may live outside our borders under a regime quite different from that which obtains in this country. Situations threatening to important American interests may arise halfway around the globe, situations which in the view of the political branches of our Government require an American response with armed force. If there are to be restrictions on searches and seizures which occur incident to such American action, they must be imposed by the political branches through diplomatic understanding, treaty, or legislation." at p. 275

¹⁰⁵350 U.S. 11 (1955)

¹⁰⁶"There are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution. Free countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service. Even as late as the Seventeenth Century standing armies and courts -martial were not established institutions in England. Court -martial jurisdiction sprang from the belief that within the military ranks there is need for a prompt, ready -at-hand means of compelling obedience and order. But Army discipline will not be improved by court-martialing rather than trying by jury some civilian ex -soldier who has been wholly separated from the service for months, years or perhaps decades. Consequently considerations of discipline provide no excuse for new expansion of court -martial jurisdiction at the expense of the normal and constitutionally preferable system of trial by jury."

Reid v. Covert¹⁰⁷ involved a petition for the writ of habeas corpus on behalf of the wife of a serviceman who allegedly killed her husband and was to be tried by a military court in England where the crime occurred¹⁰⁸. The Court, in granting the writ placed strict limitations on the jurisdiction of military courts.¹⁰⁹

In Solorio v. United States¹¹⁰ the Court overruled O'Callahan v. Parke¹¹¹ and held that persons in military service who commit common law crimes during their period of service are subject to the jurisdiction of military court even in the absence of a service connection.

CONCLUSION

¹⁰⁷354 U.S. 1 (1957)

¹⁰⁸See also Masden v. Kinsella, 343 U.S. 341 (1952) (On writ of habeas corpus, woman, convicted of murdering her husband in Germany under U.S. military law could be tried before a military tribunal.)

¹⁰⁹“It is urged that the expansion of military jurisdiction over civilians claimed here is only slight, and that the practical necessity for it is very great. The attitude appears to be that a slight encroachment on the Bill of Rights and other safeguards in the Constitution need cause little concern. But to hold that these wives could be tried by the military would be attempting precedent. Slight encroachments create new boundaries from which legions of power can seek new territory to capture.” In 2000, Congress enacted the Military Extraterritorial Jurisdiction Act making crimes committed by those “employed or accompanying the armed Forces outside the United States” a federal criminal offense. Civilians will be delivered to “civilian law enforcement authorities...” 18 USC sec. 3262.

¹¹⁰483 U.S. 435 (1987)

¹¹¹395 U.S. 258 (1969) Parker involved a serviceman who left his base, went to a bar and allegedly attempted a rape. He was arrested by civilian authorities who turned over to the military for trial. The Court stated the issue: “Does a court-martial, held under the Articles of War, Tit. 10, U.S.C. § 801 et seq., have jurisdiction to try a member of the Armed Forces who is charged with commission of a crime cognizable in a civilian court and having no military significance, alleged to have been committed off-post and while on leave, thus depriving him of his constitutional right to indictment by a grand jury and trial by a petit jury in a civilian court?” The Court held against the assumption of such jurisdiction: the defendant “was properly absent from his military base when he committed the crimes with which he is charged. There was no connection -- not even the remotest one -- between his military duties and the crimes in question. Hawaii, the situs of the crime, is not an armed camp under military control, as are some of our far-flung outposts.” The offenses were in peacetime and the civil courts were open.

The Constitution distrusts aggregations of power¹¹² It dictates separated powers. Unchecked power will tend to overreach. Close analysis of the Executive Orders signals not a lack of faith in the President, the military or the federal law enforcement apparatus, but the Constitutional prejudice that aggregated power is dangerous if unchecked. Certainly measures to discourage and punish violence directed against our foreign policy or economy is a laudable goal. However, extreme enforcement measures that introduce indefinite detention, abrogation of the rules of evidence, the exclusion of the legislative branch in the development of the rules, and the exclusion of the judicial in the trials should occur, if ever, in only the most extreme cases in which traditional methods of law enforcement and trial are clearly inappropriate. Trials conducted on the field of battle come to mind. There were no overwhelming problems in affording Timothy McVeigh, the bomber of the Oklahoma Courthouse, all of the procedural protections of the Constitution. As sinister as the attacks of September 11 were, they did not cause a general declaration of martial law and they ought not dictate a suspension of the powers of the Article III courts or the application of the United States Constitution.

APPENDIX A

November 13, 2001

President Issues Military Order

Detention, Treatment, and Trial of Certain Non

-Citizens in the War Against

¹¹²Justice Douglas, dissenting, in James v. Wyman, 400 U.S. 309 (1971) at 335 quoted Lord Acton, "I cannot accept your canon that we are to judge Pope and King unlike other men, with a favourable presumption that they did not wrong. If there is any presumption it is the other way against holders of power, increasing as the power increases. Historic responsibility has to make up for the want of legal responsibility. Power tends to corrupt and absolute power corrupts absolutely. Great men are almost always bad men, even when they exercise influence and not authority: still more when you superadd the tendency or the certainty of corruption by authority."

Terrorism

By the authority vested in me as President and as Commander in Chief of the Armed Forces of the United States by the Constitution and the laws of the United States of America, including the Authorization for Use of Military Force Joint Resolution (Public Law 107-40, 115 Stat. 224) and sections 821 and 836 of title 10, United States Code, it is hereby ordered as follows:

Section 1. Findings.

(a) International terrorists, including members of al Qaeda, have carried out attacks on United States diplomatic and military personnel and facilities abroad and on citizens and property within the United States on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces.

(b) In light of grave acts of terrorism and threats of terrorism, including the terrorist attack on September 11, 2001, on the headquarters of the United States Department of Defense in the national capital region, on the World Trade Center in New York, and on civilian aircraft such as in Pennsylvania, I proclaimed a national emergency on September 14, 2001 (Proc. 7463, Declaration of National Emergency by Reason of Certain Terrorist Attacks).

(c) Individuals acting alone and in concert involved in international terrorism possess both the capability and the intention to undertake further terrorist attacks against the United States that, if not detected and prevented, will cause mass deaths, mass injuries, and massive destruction of property, and may place at risk the continuity of the operations of the United States Government.

(d) The ability of the United States to protect the United States and its citizens, and to help its allies and other cooperating nations protect their nations and their citizens, from such further terrorist attacks depends in significant part upon using the United States Armed Forces to identify terrorists and those who support them, to disrupt their activities, and to eliminate their ability to conduct or support such attacks.

(e) To protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order pursuant to section 2 hereof to be detained, and, when tried, to be tried for violations of the law of war and other applicable laws by military tribunals.

(f) Given the danger to the safety of the United States and the nature of international terrorism, and to the extent provided by and under this order, I find consistent with section 836 of title 10, United States Code, that it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.

(g) Having fully considered the magnitude of the potential deaths, injuries, and property destruction that would result from potential acts of terrorism against the United States, and the probability that such acts will occur, I have determined that an extraordinary emergency exists for national defense purposes, that this emergency constitutes an urgent and compelling government interest, and that issuance of this order is necessary to meet the emergency.

Sec. 2. Definition and Policy.

(a) The term "individual subject to this order" shall mean any individual who is not a United States citizen with respect to whom I determine from time to time in writing that:

(1) there is reason to believe that such individual, at the relevant times,

(i) is or was a member of the organization known as al Qaeda;

(ii) 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

(iii) has knowingly harbored one or more individuals described in subparagraphs (i) or (ii) of subsection 2(a)(1) of this order;

and

(2) it is in the interest of the United States that such individual be subject to this order.

(b) It is the policy of the United States that the Secretary of Defense shall take all necessary measures to ensure that any individual subject to this order is detained in accordance with section 3, and, if the individual is to be tried, that such individual is tried only in accordance with section 4.

(c) It is further the policy of the United States that any individual subject to this order who is not already under the control of the Secretary of Defense but who is under the control of any other officer or agent of the United States or any States shall, upon delivery of a copy of such written determination to such officer or agent, forthwith be placed under the control of the Secretary of Defense.

Sec.3.Detention Authority of the Secretary of Defense. Any individual subject to this order shall be --

(a) detained at an appropriate location designated by the Secretary of Defense outside or within the United States;

(b) treated humanely, without any adverse distinction based on race, color, religion, gender, birth, wealth, or any similar criteria;

(c) afforded adequate food, drinking water, shelter, clothing, and medical treatment;

(d) allowed the free exercise of religion consistent with the requirements of such detention; and

(e) detained in accordance with such other conditions as the Secretary of Defense may prescribe.

Sec.4. Authority of the Secretary of Defense Regarding Trial of Individuals Subject to this Order.

(a) Any individual subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including life imprisonment or death.

(b) As a military function and in light of the findings in section 1, including subsection (f) thereof, the Secretary of Defense shall issue such orders and regulations, including orders for the appointment of one or more military commissions, as may be necessary to carry out subsection (a) of

this section.

(c) Orders and regulations issued under subsection (b) of this section shall include, but not be limited to, rules for the conduct of the proceedings of military commissions, including pretrial, trial, and post-trial procedures, modes of proof, issuance of process, and qualifications of attorneys, which shall at a minimum provide for --

(1) military commissions to sit at any time and any place, consistent with such guidance regarding time and place as the Secretary of Defense may provide;

(2) a full and fair trial, with the military commissions sitting as the triers of both fact and law;

(3) admission of such evidence as would, in the opinion of the presiding officer of the military commission (or instead, if any other member of the commissions so requests at the time the presiding officer renders that opinion, the opinion of the commission rendered at that time by a majority of the commission), have probative value to a reasonable person;

(4) in a manner consistent with the protection of information classified or classified under Executive Order 12958 of April 17, 1995, as amended, or any successor Executive Order, protected by statute or rule from unauthorized disclosure, or otherwise protected by law, (A) the handling of, admission into evidence of, and access to materials and information, and (B) the conduct, closure of, and access to proceedings;

(5) conduct of the prosecution by one or more attorneys designated by the Secretary of Defense and conduct of the defense by attorneys for

the individuals subject to this order;

(6) conviction only upon the concurrence of two _____ -thirds of the members of the _____ commission present at the time of the vote, a majority being present;

(7) sentencing only upon the concurrence of two _____ -thirds of the members of the commission present at the time of the vote, a majority _____ being present; and

(8) submission of the record of the trial, including any conviction or sentence, for review and final decision by me or by the Secretary of Defense if so designated by _____ me for that purpose.

Sec. 5. Obligation of Other Agencies to Assist the Secretary of Defense.

Departments, agencies, entities, and officers of the United States shall, to the maximum extent permitted by _____ law, provide to the Secretary of Defense such assistance as he may request to implement this order.

Sec. 6. Additional Authorities of the Secretary of Defense.

(a) As a military function and in light of _____ the findings in section 1, the Secretary of Defense shall issue such orders and regulations as may be necessary to carry out any of the provisions of this order.

(b) The Secretary of Defense may perform a _____ ny of his functions or duties, and may exercise any of the powers provided to him under this order (other than under section 4(c)(8) hereof) in accordance with section 113(d) of title 10, United States Code.

Sec. 7. Relationship to Other Law and Forums.

(a) Nothing in this order shall be construed to --

(1) authorize the disclosure of state secrets to any person not otherwise authorized to have access to them;

(2) limit the authority of the President as Commander in Chief of the Armed Forces or the power of the President to grant reprieves and pardons; or

(3) limit the lawful authority of the Secretary of Defense, any military commander, or any other officer or agent of the United States or of any State to detain or try any person who is not an individual subject to this order.

(b) With respect to any individual subject to this order --

(1) military tribunals shall have exclusive jurisdiction with respect to offenses by the individual; and

(2) the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceedings 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.

(c) This order is not intended to and does not create any right, benefit, or privilege, substantive or procedural, enforceable at law or equity by any party, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person.

(d) For purposes of this order, the term "State" includes any State, district, territory, or possession of the United States.

(e) I reserve the authority to direct the Secretary of Defense, at any time hereafter, to transfer to a governmental authority control of any individual subject to this order. Nothing in this order shall be construed to limit the authority of any such governmental authority to prosecute any individual for whom control is transferred.

Sec. 8. Publication.

This order shall be published in the Federal Register.

GEORGE W. BUSH

THE WHITE HOUSE,

November 13, 2001.

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