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CONSTITUTIONAL LAW-POWER OF SUPREME COURT TO REVIEW JUDGMENTS OF INTERNATIONAL MILITARY TRIBUNAL FOR FAR EAST

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CONSTITUTIONAL LAW—POWER OF SUPREME COURT TO REVIEW JUDGMENTS OF INTERNATIONAL MILITARY TRIBUNAL FOR FAR EAST—By agreement of the foreign secretaries of Great Britain, Russia and the United States, the Far Eastern Commission was established to formulate policies for the post-surrender control of Japan.[1] The commission issued a policy decision to effectuate the clause of the Potsdam Declaration, incorporated into the Japanese surrender terms, calling for "stern justice . . . to all war criminals."[2] Pursuant to this decision, General

[1] Dept. of State Pub. 2888, Far Eastern Ser. 24, p. 2 (1947). This action was not formally approved by joint resolution or by a two-thirds vote of the Senate.

[2] Id. at 97. For the Potsdam Declaration and the Terms of Surrender, see Dept. of State Pub. 2671, Far Eastern Ser. 17, pp. 53, 62 (1946).

MacArthur, as Supreme Commander for the Allied Powers, established the International Military Tribunal for the Far East (I.M.T.F.E.).[3] Petitioners, enemy aliens convicted of war crimes by the tribunal, filed motions in the Supreme Court for writs of habeas corpus.[4] They argued, inter alia, that the executive branch of the government had no power to enter into agreements with other nations pertaining to the definition of war crimes and their punishment, and that an American army officer could not constitutionally act as an agent for the Allied Powers in establishing the tribunal.[5] In opposition to the motions it was urged (1) that the judgment under which petitioners were held was that of an international tribunal, not reviewable by any national court; (2) that the President had power to join other nations in establishing the tribunal; and (3) that American officers could act as agents of the Allied Powers in establishing the tribunal and in carrying out its judgments, even if participation of the United States was unauthorized.[6] *Held,* motions denied. "The military tribunal . . . has been set up by General MacArthur as the agent of the Allied Powers. . . . [C]ourts of the United States have no power or authority to review, to affirm, set aside or annul the judgments and sentences imposed. . . ." *Hirota v. MacArthur,* (U.S. 1948) 69 S.Ct. 197.

Although the Department of State certified that the I.M.T.F.E. was an "international court,"[7] the Court did not expressly call it such.[8] It seems clear, however,

[3] Dept. of State Pub. 2613, Far Eastern Ser. 12, p. 39 (1946). The charter of this tribunal closely follows that of the first far eastern tribunal which was authorized by unilateral action of the United States and which the present tribunal superseded. See Dept. of State Pub. 2671, Far Eastern Ser. 17, p. 147 (1946).

[4] Breaking a long-standing deadlock, Justice Jackson voted for review on the question of the Court's jurisdiction, to avoid adverse foreign opinion which might have resulted from allowing execution of sentences without a hearing on a question which four Justices considered doubtful. Hirota v. MacArthur, (U.S. 1948) 69 S.Ct. 157.

[5] United States Constitution, Art. I, § 9: ". . . no person holding any office of profit or trust under [the United States], shall, without the consent of Congress, accept of any . . . office, or title, of any kind whatever, from any . . . foreign State."

[6] It was also argued that petitioners had no standing to assert Constitutional rights; that no writ could issue under the habeas corpus statute since there was no confinement and no person having effective custody within the territory of the United States; that the tribunal had not exercised any "judicial power" which the Court could review, and that to permit domestic legal policy to prejudice international agreements would create intolerable uncertainty as to the position of the United States in international affairs. See Brief in Opposition to Motions, pp. i, ii, principal case.

[7] Letter from Robert A. Lovett, Acting Sec. of State., Appendix B, Brief in Opposition to Motions, p. 110 (Dec. 14, 1948), principal case.

[8] It has been argued that a prerequisite to jurisdiction of an "international" tribunal over war criminals is assent to such jurisdiction by the nation whose subjects are to be tried. Schick, "The Nuremberg Trial and the International Law of the Future," 41 AM. J. INT. L. 770 (1947); April, "An Inquiry into the Juridical Basis for the Nuremberg War Crimes Trial," 30 MINN. L. REV. 313 (1946); Kelsen, "Collective and Individual Responsibility in International Law With Particular Regard to the Punishment of War Criminals," 31 CAL. L. REV. 530 (1943). The I.M.T.F.E. has in this respect a stronger claim to international legitimacy than did its Nuremberg cousin, Japanese assent being derived through acceptance of the Potsdam Declaration in the terms of surrender. Schick, "War Criminals and the Law of the United Nations," 7 UNIV. TOR. L. J. 27 (1947). The nature of this "assent" may be open

that the Tribunal was not an American military court,[9] and whether it was considered an international court or a court created by and functioning under the authority of a foreign sovereign, the Supreme Court would have no appellate jurisdiction.[10] Neither United States leadership in far eastern affairs[11] nor the omission from the Far Eastern charter of the provisions found in the Nuremberg charter against appeal and challenge to jurisdiction[12] could enlarge the Court's jurisdiction. Determination of the legality of American participation in the establishment of the court was not necessary to the decision, and, despite Justice Jackson's opinion that the President's power over the conduct of foreign affairs was a principal question in the case,[13] no intimation of the Court's view on that question is given.[14] If the validity of petitioners' argument on this point is assumed, some doubt is raised as to the status of General MacArthur. It would be at least arguable that he had accepted a position of trust in the service of a foreign power contrary to the Constitution.[15] Carrying out policies which the President has no authority to help formulate might be considered invalid though "exercising allied command in a coalition war" would not.[16] It seems doubtful, however, that petitioners' assertion is sound. The President as commander-in-chief of the armed forces may set up military government in occupied territories, and cooperation with other nations in so doing seems warranted,[17] even to the extent of setting up joint courts.[18] Since the advice and consent of the Senate are not the *sine qua non* of

to question, but it was plainly an act of the Japanese government, whereas the surrender in Europe was that only of the German armed forces and not of the government, and contained no assent to prosecution of war criminals. See Rheinstein, "The Legal Status of Occupied Germany," 47 MICH. L. REV. 23 (1948).

[9] The finding that the I.M.T.F.E. was "not a tribunal of the United States" would not preclude issuance of the writ. Military courts are not "courts of the United States": Mechanics' and Traders' Bank v. Union Bank, 22 Wall. (89 U.S.) 276, 295 (1875); Ex parte Vallandigham, 1 Wall. (68 U.S.) 243, 251 (1864); Duncan v. Kahanamoku, 327 U.S. 304, 309, 66 S.Ct. 606 (1946); yet the Court may review the issue of their jurisdiction. See Battle, "Military Tribunals," 29 VA. L. REV. 255, 262 (1942); 40 ILL. L. REV. 546 (1946).

[10] The appellate jurisdiction of the Court is limited by the Constitution, Art. III, § 2.

[11] See note 3, supra. Policy decisions of the Far Eastern Commission are communicated to MacArthur via orders formulated by the American Joint Chiefs of Staff. The American Eighth Army carries out the tribunal's sentences.

[12] Charter of the International Military Tribunal, Arts. 3, 26. Dept. of State Pub. 2420, p. 15, 21 (1945).

[13] Hirota v. MacArthur, (U.S. 1948) 69 S.Ct. 157.

[14] Justice Douglas' concurring opinion, to be delivered later, may deal with this question.

[15] See note 5, supra. Query whether the Court could order a cessation of his activity on behalf of the Allied Powers.

[16] See Brief in Opposition to Motions, p. 102, principal case.

[17] The executive power to incur future obligations may be limited. See 3 DEPT. OF STATE BUL. No. 63, p. 201 (1940) (opinion of Atty. Gen. Jackson to the President on the power to exchange destroyers for naval bases).

[18] In Mechanics' and Traders' Bank v. Union Bank, 22 Wall. (89 U.S.) 276 (1875) and The Grapeshot, 9 Wall. (76 U.S.) 129 (1870), the President's power to set up courts of general jurisdiction in conquered territory was upheld. A similar power should obtain as to occupied territory. War Dept. F.M. 27-5, § V ¶ 25 (1940); 3 HYDE, INTERNATIONAL LAW, § 690 (1945).

American cooperation in foreign affairs through executive action, it would seem to require no great extension of recognized principles to establish the legal basis of the action of the Executive questioned in the instant case.[19] A decision that the judgment of the I.M.T.F.E. was reviewable, or that the participation of the United States was without legal basis, would inevitably have had a regrettable effect upon the smooth functioning of international affairs.

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[19] CORWIN, THE PRESIDENT: OFFICE AND POWERS 200, 238 (1941); 5 HACKWORTH, DIGEST OF INTERNATIONAL LAW, § 515 (1943); McDougal and Lans, "Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy: I," 54 YALE L. J. 181, 270, 282 (1945); MCCLURE, INTERNATIONAL EXECUTIVE AGREEMENTS 50 (1941); United States v. Belmont, 301 U.S. 324, 57 S.Ct. 758 (1937); United States v. Pink, 315 U.S. 203, 62 S.Ct. 552 (1942).