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CONSTITUTIONAL LAW—TRIAL BY MILITARY COMMISSION OF ENEMY COMBATANT AFTER CESSATION OF HOSTILITIES—SCOPE OF INQUIRY IN HABEAS CORPUS PROCEEDINGS—Petitioner, the Commanding General of the Fourteenth Army Group of the Imperial Japanese Army in the Philippine Islands, surrendered to and became a prisoner of war of the United States Army Forces in Baguio, Philippine Islands on September 3, 1945. By order of respondent, petitioner was served, on September 25, with a charge setting forth a violation of the law of war.[1] On October 8 petitioner, after pleading not guilty to the charge, was held for trial before a military commission of five

[1] The charge stated: "Tomoyuki Yamashita, General Imperial Japanese Army, between 9 October 1944 and 2 September 1945, at Manila and other places in the Philippine Islands, while commander of armed forces of Japan at war with the United States of America and its allies, unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against people of the United States and of its allies and dependencies, particularly the Philippines; and he, General Tomoyuki Yamashita, thereby violated the laws of war."

Army officers appointed by General Styer, and a bill of particulars was filed by the prosecution specifying sixty-four items. On October 29, the day of commencement of trial, a supplemental bill of particulars was filed, containing fifty-nine additional specifications, a copy of which had been given to the defense three days earlier. On December 7, the commission pronounced petitioner guilty and sentenced him to death by hanging. Appeal was made to the Supreme Court of the United States for leave to file a petition for writs of habeas corpus and prohibition, and also a petition for certiorari to review an order of the Supreme Court of the Commonwealth of the Philippines denying petitioner's application to that court for writs of habeas corpus and prohibition. Petitioner claimed that his detention for trial by the military commission was without lawful authority or jurisdiction and raised the following questions: (1) whether the military commission was lawfully created, and whether such a tribunal could be convened after the cessation of hostilities to try him for a violation of the law of war; (2) whether the charge, that as commander he had failed to control the troops under his command by permitting them to commit atrocities, in fact stated a violation of the law of war; (3) whether he was denied a fair trial in violation of the due process clause of the Fifth Amendment because the order governing the procedure of the commission, which authorized the admission of certain types of evidence, was contrary to the Articles of War which prescribe the procedure before military tribunals, and violated the provisions of the Geneva Convention of 1929, which stipulate that a prisoner of war shall be entitled to trial by the same courts and according to the same procedure as in the case of persons belonging to the armed forces of the detaining power; and (4) whether the commission was without jurisdiction because of the failure to give advance notice of his trial to the neutral power representing the interests of Japan as a belligerent, as required by the Geneva Convention of 1929. *Held*, both petitions denied, since it appeared that "the order convening the commission was a lawful order, that the commission was lawfully constituted, that petitioner was charged with a violation of the law of war, and that the commission had authority to proceed with the trial, and in doing so did not violate any military, statutory or constitutional ground" (Justices Murphy and Rutledge dissenting). *Application of Yamashita, and Yamashita v. Styer, Commanding General, U.S. Army Forces, Western Pacific*, (U.S. 1945) 66 S.Ct. 340.[2]

The entire court agreed that Congressional action in sanctioning creation of military commissions, appointed by military command, to try and to punish enemy combatants for violations of the law of war was valid; [3] also, that Con-

[2] With the same division of justices, this case was authority for denying similar petitions by General Homma after his conviction, Homma v. Styer, (U.S. 1946) 66 S. Ct. 515.

[3] 41 Stat. L. 787 at 790, 794, 796, 804 (1920); 10 U.S.C. (1940) § 1471 at §§ 1486, 1509, 1517, 1553, 1554; Articles of War 15, 38, 46, 81, 82; United States Constitution, Art. I, § 8, Cl. 10; Ex parte Milligan, 4 Wall. (71 U.S.) 2 (1866); Ex parte Quirin, 317 U.S. 1, 63 S. Ct. 2 (1942); WINTHROP, MILITARY LAW AND PRECEDENTS, 2d ed., 831 et seq. (1920). For a general history of the development of the military commission see WINTHROP at 831, 835; 11 Op. Atty. Gen. 297 at 300 (1869); BASIC FIELD MANUAL FM 27-5, Military Government § 5; Ballantine, "Unconstitutional Claims of Military Authority," 24 YALE L.J. 189 at 205 (1915);

gress had incorporated by reference, as within the jurisdiction of such commissions, all of the offenses against the law of war, although it had not codified nor defined those offenses precisely.[4] Beyond that point the majority and minority split sharply on practically every issue.[5] Chief Justice Stone, speaking for the majority, pointed out the sharp restrictions which have traditionally hedged in the inquiry which a civil court may make into the proceedings and determinations of military tribunals, limiting any such review solely to the question of whether the military court or commission was acting within its jurisdiction and not volating any applicable statutes.[6] Indeed, the Chief Justice suggests that even violations of statutes concerning procedure or the admissibility of evidence may not be reviewable on petition for habeas corpus.[7] Having regard to this gen-

Stein, "Judicial Review of Determinations of Federal Military Tribunals," 11 BROOKLYN L. REV. 30 (1941); Miller, "Relation of Military to Civil and Administrative Tribunals in Time of War," 7 OHIO ST. L.J. 188, 400 (1941); Cushman, "Ex Parte Quirin Et Al—The Nazi Saboteur Case," 28 CORN. L. Q. 54 (1942); Munson, "The Arguments In the Saboteur Trial," 91 UNIV. PA. L. REV. 239 (1942); 56 HARV. L. REV. 631 (1943); Glueck, "By What Tribunal Shall War Offenders Be Tried?" 56 HARV. L. REV. 1059 (1943), who states at 1065, note 17, that at that time the War Department had no record of the trial by an American military commission of a single soldier for violating the laws and customs of war.

[4] Especially Article of War 15 (see supra, note 3). For listings of some of the breaches of the law of war see, 11 Op. Atty. Gen. 297 at 299-300, 310 (1869); Ex parte Quirin, 317 U.S. 1 at 32, 63 S. Ct. 2 (1942). On the sources and nature of the law of war, see, WINTHROP, MILITARY LAW AND PRECEDENT, 2d. ed., 41, 42, 773 ff., 839 (1920); BASIC FIELD MANUAL FM 27-10, Rules of Land Warfare, § 347 (1940); various treaties and international agreements as listed in LACHS, WAR CRIMES 5 (1945); DAVIS, MILITARY LAW OF THE UNITED STATES, 1st ed., 309, 310 (1898); Colby, "Courts-Martial and the Laws of War," 17 A.J. INT. L. 109 (1923); Manner, "The Legal Nature and Punishment of Criminal Acts of Violence Contrary to the Laws of War," 37 A.J. INT. L. 407 (1943); Kelsen, "Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals," 31 CAL. L. REV. 530 (1943); TRAININ, HITLERITE RESPONSIBILITY UNDER CRIMINAL LAW (1945); Wright, "War Criminals," 39 A.J. INT. L. 257 (1945).

[5] Justice Murphy's dissent ran to seven pages in the Supreme Court Reporter, and Justice Rutledge's to twenty pages.

[6] "If the military tribunals have lawful authority to hear, decide and condemn, their action is not subject to judicial review merely because they have made a wrong decision on disputed facts. Correction of their errors of decision is not for the courts but for the military authorities which are alone authorized to review their decisions." Principal case at 344. Precedent in support of this point is overwhelming, Ex parte Vallandingham, 1 Wall. (68 U.S.) 243 (1863); In re Vidal, 179 U.S. 126, 21 S. Ct. 48 (1900); Ex parte Quirin, 317 U.S. 1, 63 S. Ct. 2 (1942); 20 L.R.A. (N.S.) 413, note (1909); Stein, "Judicial Review of Determinations of Federal Military Tribunals," 11 BROOKLYN L. REV. 30 (1941), and cases cited therein; Rose ex. rel. Carter v. Roberts, (C.C.A. 2d, 1900) 99 F. 948; Covington, "Judicial Review of Courts-Martial," 7 GEO WASH. L. REV. 503 (1939); Kaplan, "Constitutional Limitations on Trials by Military Commissions," 92 UNIV. PA. L. REV. 119 (1943), id. at 272 (1944).

[7] He states, id. at 351, "Nothing we have said is to be taken as indicating any opinion on the question of . . . whether the action of a military tribunal in admitting

eral rule, and in view of the nature of the proceedings before the commission which the Court accepted in this case,[8] it may be said that the decision stands for the proposition that under practically no circumstances[9] will a civil court interfere with the absolute freedom of discretion as to procedure and rules of evidence granted to a legally constituted military commission acting within the proper scope of its jurisdiction.[10] This seems to be the case even if the commission departs in important particulars from the safeguards inherent in normal judicial process.[11] On the other hand, the necessity of judicial protection of civil liberty is not ignored in this case since the Court reiterates its contention that no one, not even an active enemy combatant, may be deprived of his right to make a defense, or to contest the authority of the officials trying him as con-

evidence, which Congress or controlling military command has directed to be excluded may be drawn in question by petition for habeas corpus or prohibition." A few cases have held that it may not, Ex parte Tucker, (D.C. Mass. 1913) 212 F. 569; Ex parte Dickey, (D.C. Me. 1913) 204 F. 322; United States v. Maney, (C.C. Minn. 1894) 61 F. 140; In re Grimley, 137 U.S. 147, 11 S. Ct. 54 (1890); Kurtz v. Moffit, 115 U.S. 487, 6 S. Ct. 148 (1895); Ex parte Reed, 100 U.S. 13 (1879); Dynes v. Hoover, 61 U.S. 65 (1857). But compare Justice Murphy's statement (principal case at 355) to the effect that he understands the scope of review recognized by the Court to include the question of whether the commission, in admitting certain evidence, had violated any controlling statute.

[8] Justice Rutledge mentions the following discrepancies: denial of opportunity to prepare defense in that the petitioner was given only three weeks to prepare a defense to the bill of particulars and then was served with a supplemental bill of particulars on the day the trial started, with no continuance granted; admission of hearsay once or several times removed, relating to various incidents, rumors and reports; admission of opinion evidence and conclusions of guilt; accepting as sole proof of certain specifications, ex parte affidavits; admission of "untrustworthy, unverified, unauthenticated evidence which could not be probed by cross-examination or other means of testing credibility, probative value or authenticity." Principal case at 365.

[9] Or maybe "under no circumstances." However, the Chief Justice does say, (principal case at 348), "There is no contention that the present charge, thus read, is without support of evidence, or that the commission held petitioner responsible for failing to take measures which were beyond his control or inappropriate for a commanding officer to take in the circumstances." Query, would the Court go beyond a mere jurisdictional investigation in a more extreme case?

[10] The question immediately presents itself as to whether this is simply a doctrine of inter armas silent leges, applicable solely to military commissions trying persons for violations of the law of war, or whether it is equally applicable to all military tribunals. Even in the first mentioned situation does not the path indicated by the Quirin case, i.e., trial of citizen and non-citizen civilians before a military commission in the United States proper, point to a possible suspension of constitutional rights in a much broader way?

[11] Though not bound to the letter of Constitutional requirements, military courts are said to be within its spirit. See Naval Court Martial Order No. 48, 1920, I COMP. OF COURT MARTIAL ORDERS, 1916-1937 (1940), and citations therein. In general on procedure, see MUNSON AND JAEGER, MILITARY LAW AND COURT MARTIAL PROCEDURE (1941); IVES, TREATISE ON MILITARY LAW 284 (1879); WINTHROP, MILITARY LAW AND PRECEDENTS, 2d ed., 841 ff. (1920); Glueck, "By What Tribunal Shall War Offenders Be Tried?" 56 HARV. L. REV. 1059 at 1072 (1943).

trary to the Constitution or laws of the United States.[12] Apparently the Court will inquire into any detention to see if the party is being wrongfully held by military officials and subject only to a trial in a civil court. The commission's jurisdiction as to time,[13] place, person, and offense were carefully examined. The first three elements were easily satisfied, but on the question whether the offense constituted a violation of the law of war, Justice Stone was hard pushed to reconcile the allegations with accepted principles of international law and to find the requisite duty and power,[14] to say nothing of knowledge and intention which were not mentioned even once in his opinion.[15] In its comments on the Articles of War, which partially prescribe the procedure for military courts and

[12] Ex parte Kawato, 317 U.S. 69, 63 S. Ct. 115 (1942); In re Quirin, 317 U.S. 1, 63 S. Ct. 2 (1942). Just how far the Court will go in recognizing constitutional rights in enemy subjects is still open to question. The Kawato case relies heavily on United States residency for its result, and neither the Quirin case nor the instant one do more than make slight comments on petitioners' right "to contend that the Constitution or laws of the United States withhold authority to proceed with the trial." For the traditional view, that enemy aliens and prisoners of war have no rights or privileges under municipal law, see Smith, "Martial Law and the Writ of Habeas Corpus," 30 GEO. L. J. 697 (1942).

[13] It is clear that military government and discipline may remain in effect until an actual declaration of peace, BIRKHIMER, MILITARY GOVERNMENT AND MARTIAL LAW 361-369 (1914); WILSON, HANDBOOK OF INTERNATIONAL LAW 308, 309-312 (1910); United States v. Anderson, 9 Wall. (76 U.S.) 56 (1869); The Protector, 12 Wall. (79 U.S.) 700 (1871); McElrath v. United States, 102 U.S. 426 (1880); Kahn v. Anderson, 255 U.S. 1, 41 S. Ct. 224 (1920); Treaty of Peace With Germany (1919), 13 AM. J. INT. L. SUPP. 151 at 250-251 (1919).

[14] The limits of this note prevent any discussion of the possibility that the duty was created ex post facto, a point which is basic not only in this case but also in the Nuernberg Trials. This subject has recently received a great deal of attention. See GLUECK, WAR CRIMINALS THEIR PROSECUTION AND PUNISHMENT (1944); Kelsen, supra, note 4, 31 CAL. L. REV. 530 (1943); TRAININ, HITLERITE RESPONSIBILITY UNDER CRIMINAL LAW (1945); Wright, "War Criminals," 39 AM. J. INT. L. 257 (1945); Hyde, "Punishment of War Crimes," AM. SOC. OF INT. L. PROC. 39 (1943).

[15] Apparently the majority of the Court visualizes an absolute responsibility on the part of military commanders. Justice Rutledge forcefully states that there was a "vagueness, if not vacuity" in both the charge and the findings as to whether Yamashita's offense consisted in his inaction with actual knowledge, or in his negligent failure to discover and take steps to prevent widespread atrocities. In this connection it is interesting to note that the recommendations of the Committee of Responsibilities for the prosecution of war criminals in World War I were specifically objected to by the American and Japanese delegations because they proposed punishment for negative criminality. The Japanese opposed "indicting . . . highly placed enemies on the sole ground that they abstained from preventing, putting an end to, or repressing acts in violations of the laws and customs of war." VIOLATIONS OF THE LAWS AND CUSTOMS OF WAR—REPORTS OF MAJORITY AND DISSENTING REPORTS OF AMERICAN AND JAPANESE MEMBERS OF THE COMMITTEE OF RESPONSIBILITIES, CONFERENCE OF PARIS, 1919. See also GLUECK, WAR CRIMINALS THEIR PROSECUTION AND PUNISHMENT, Carnegie Endowment for International Peace, Div. of International Law, Pamphlet No. 32 (1944).

specify certain types of admissible evidence,[16] the Court employs a strained construction to find them inapplicable. Its conclusion, while possibly historically sound, is certainly novel.[17] A similar approach is taken with regard to the failure of the commission to comply with the requirements of the Geneva Convention relative to the rights of prisoners of war when they are arraigned for trial by their captors.[18] Only by the narrowest reasoning can the Court avoid saying that the plain words of the agreement were violated.[19] The dissenting opinions invoke the due process clause of the Fifth Amendment as applicable to "any person" without exception as to war crimes, and proceed to a careful examination of the procedural and evidentiary rulings of the commission in obvious disregard of the general rule against such review.[20] Justice Murphy frankly proposes an expansion of the Court's right of inquiry into the proceedings before military tribunals, stating,[21] "judicial review available by habeas corpus must

[16] Especially Article 25, which prohibits the reception of depositions by the prosecution in capital cases, and Article 38 which gives the President authority to prescribe the procedure, including modes of proof, for all military tribunals, and directs him to apply the rules of evidence generally recognized in criminal cases tried in civil courts.

[17] Principal case at 349-350. The argument of the majority is that the Articles of War are not meant to apply to military commissions when they are trying prisoners of war. A somewhat similar view of the dual aspect of military commissions is taken by Miller, "Relation of Military to Civil and Administrative Tribunals in Time of War," 7 OHIO ST. L.J. 188 at 193, note 10 (1941).

[18] Article 60, 47 Stat. L. 2051 (1929), states: "At the opening of a judicial proceeding directed against a prisoner of war, the detaining Power shall advise the representative of the protecting Power [in this case, Switzerland] thereof as soon as possible, and always before the date set for the opening of the trial." Article 63, 47 Stat. L. 2052 (1929), provides: "Sentence may be pronounced against a prisoner of war only by the same courts and according to the same procedure as in the case of persons belonging to the armed forces of the detaining Power."

[19] It appears that the Chief Justice could have more easily avoided the problem by attributing a forfeiture of all prisoner of war rights to Yamashita by virtue of his primary status as a war criminal. FLORY, PRISONERS OF WAR (1942) states at 37: "It is recognized in customary international law that persons otherwise entitled to the status of prisoners of war may forfeit the right to such status by the commission of certain acts as espionage, violation of parol, and war crimes."

[20] Numerous difficulties appear when an attempt is made to apply the due process clause to the facts of the principal case. In order to do so the following questions must be answered in the affirmative: (1) Do non-resident enemy aliens have any Constitutional rights? (See supra, note 12). (2) Are military tribunals of any sort subject to the due process requirements of the Fifth Amendment? In an older case the Supreme Court stated that so far as those in the military service are concerned, military law is due process, Reaves v. Ainsworth, 219 U.S. 296, 31 S. Ct. 230 (1911). And certainly an enemy soldier has no greater rights than a member of our own armed forces. (3) Is due process a proper subject of judicial review by way of a collateral attack through a petition for a writ of habeas corpus? If (1) and (2) are accepted it follows that there may be good ground for extending the scope of the court's scrutiny since the argument basic to its denial in appeal from a civil court is missing, i.e., that other adequate remedies for a complete review are available. However, as noted before, precedent is definitely to the contrary.

[21] Principal case at 355.

be wider than usual in order that proper standards of justice may be enforceable."[22] Justice Rutledge's lengthy dissent goes much further in reviewing not only procedural defects, but even the sufficiency of the evidence. By applying the Articles of War, the Geneva Conference, and the due process clause he has no difficulty in concluding that the commission was without jurisdiction from beginning to end. It is submitted that even within the proper limits of the scope of review as spelled out by Chief Justice Stone, the Court without great difficulty and with considerable justification, could have granted the petitions and required a retrial because of fatal defects in the proceedings and in the charge as drawn. In this manner it could have set a precedent which would require military justice to show some semblance of due process. But to construe statutes so narrowly against the interest of a party on trial for his life, in the face of extremely unusual legal procedures, when the entire prosecution is based on a somewhat doubtful theory, is to admit that military tribunals may act in flagrant disregard of our constitutional tradition. If war criminals are to be "tried," rather than summarily condemned by political decision, is it not more consistent with the notion of the supremacy of the "law of the land" to conduct the trials in accordance with at least the minimum requirements of fair procedure?

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[22] Justice Murphy's dissent is devoted mainly to the substantive issue. He states a lack of precedent for creating, and the non-existence of, a duty as alleged; failure to allege knowledge; and inability to prevent the offenses. To sustain the last mentioned item, Murphy relies on evidence of the tactical situation introduced by himself, in direct opposition to Stone's comment that there was no contention that Yamashita was being held responsible for measures which were beyond his control (supra, note 9).