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Background Essay—Due Process and Military Justice

Directions: Read and discuss the following essay and then answer the questions at the end.

The United States Constitution guarantees certain due process rights to people accused of violating the law. To what extent, if at all, do these due process rights extend to suspected terrorists and foreigners captured in wartime? Both U.S. law and international law govern the treatment of such individuals, but questions remain about the application of those laws. For example, what due process rights apply to U.S. citizens who aid the enemy? To civilian citizens of an enemy nation? To terrorists? In the heat of battle, how can military officials differentiate between innocent civilians, spies and other combatants? One way to sort out these cases is to hold hearings before military commissions. A military commission is a form of tribunal used to conduct investigations and administer justice for unlawful conduct during wartime.

History of Military Commissions in U.S. Conflicts

General Winfield Scott, commanding American forces during the Mexican-American War of 1846–48, coined the term, “military commission” as it is commonly understood today. He developed procedures for military tribunals that would try individuals (both Americans and Mexican nationals) charged with offenses not triable by courts-martial. These offenses, according to the U.S. Department of Defense Office of Military Commissions, included “assassination, murder, poisoning, rape, or the attempt to commit either, malicious stabbing or maiming, malicious assault and battery, robbery, theft, the wanton desecration of churches, cemeteries, or other religious edifices and fixtures,

the interruption of religious ceremonies, and the destruction, except by order of a superior officer, of public or private property.”

Article I, Section 8, Clauses 11 and 14 of the U.S. Constitution grant to Congress the power to govern the conduct of U.S. military forces, which it did in the early days of the republic through laws called the Articles of War. The president, as commander in chief, directs procedures to conduct courts-martial and military commissions. In 1920, Congress required the president, in these proceedings, to apply the rules of evidence used in federal criminal trials, “in so far as [he] deems practicable.”

In 1950, Congress developed the Uniform Code of Military Justice (UCMJ) to replace the Articles of War. UCMJ applies to courts-martial, military commissions, and other military tribunals. The UCMJ requires the president to ensure that rules of evidence and other procedures for these trials are consistent with those applied in U.S. criminal trials and in courts-martial, to the extent that those rules are practicable in the president’s judgment.

Landmark Cases Dealing with Military Justice

Ex parte Milligan (1866)

CONSTITUTIONAL QUESTION

Does a military court have jurisdiction over the criminal trial of a civilian when the civilian courts are available?

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U.S. forces arrested Lambdin P. Milligan, a civilian resident of Indiana, on October 5, 1864. He was charged with joining a secret organization seeking to overthrow the government, communicating with the enemy, “conspiring to seize munitions of war stored in the arsenals; to liberate prisoners of war; [and with] resisting the draft.” He was tried before a military tribunal, convicted on all charges, and sentenced to death. Just a few days before his scheduled execution, he petitioned for a writ of *habeas corpus* in a local federal court. He believed that, since he was an American citizen living in a state that had not seceded, he should have had a criminal trial in a civilian court, rather than a military trial. In a unanimous opinion written by Justice David Davis, the Supreme Court agreed with him. A civilian must be tried in a civil court, as long as civil courts were operational. The Court noted the government’s power to suspend *habeas corpus* in rebellion or invasion, but pointed out that the citizens’ Sixth Amendment right to trial by jury was preserved. The Framers knew that “trial by an established court, assisted by an impartial jury, was the only sure way of protecting the citizen against oppression and wrong. Knowing this, they limited the suspension to one great right [*habeas corpus*], and left the rest to remain forever inviolable.”

The ruling also defined conditions for martial law and asserted civilian power over the military. “Martial law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration...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.”

To rule otherwise, the Court explained, would mean that “republican government is a failure, and there is an end of liberty regulated by law...martial law

[imposed in this manner] destroys every guarantee of the Constitution, and effectually renders the ‘military independent of and superior to the civil power.’”

Ex parte Quirin (1942)

CONSTITUTIONAL QUESTION

Does trial by military commission violate the rights of foreign saboteurs captured in the United States during wartime?

In June 1942, in a mission called Operation Pastorius, eight Nazi agents who reached the United States by submarine planned to sabotage several U.S. targets, including aluminum and magnesium plants, railroads, canals, and others. Richard Quirin, George Dasch, Ernst Burger, and Herbert Haupt landed in Long Island, New York, and four other men landed a few days later in Florida. Two of the saboteurs, Burger and Dasch, surrendered to the Federal Bureau of Investigation, providing information leading to the arrest of the other six men.

President Franklin Roosevelt issued Executive Proclamation 2561 creating a military tribunal to conduct their trial, which took place from July 8 to August 1, 1942. All eight men were found guilty of conspiring to violate the law of war and give intelligence to the enemy, and they were sentenced to death. All of the conspirators, except Dasch, filed petitions for a writ of *habeas corpus*, maintaining that their trial by military commission violated their rights to a trial under the Fifth and Sixth Amendments. After the Federal District Court denied their claim, the U.S. Supreme Court agreed to hear their cases. Did the president exceed his authority by ordering the foreign saboteurs to be tried by military commission rather than by a civilian court?

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On July 31, the Court unanimously ruled that the president had not exceeded his authority in ordering a military trial. The conspirators did not have the right to a civilian trial because they were unlawful enemy combatants.

Chief Justice Harlan Fisk Stone authored the Court's opinion:

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

The president commuted the sentences of Burger and Dasch to life in prison because of their confession and cooperation with the FBI, but the other six agents were executed in the electric chair in the District of Columbia jail on August 8, 1942. In 1948, President Truman deported Dasch and Burger to Germany.

Johnson v. Eisentrager (1950)

CONSTITUTIONAL QUESTION

Does the constitutional guarantee of *habeas corpus* apply to non-resident enemy aliens who are arrested and tried outside of the United States?

On V-E Day (May 8, 1945), German officials unconditionally surrendered to the Allied Powers, formally marking the end of World War II in Europe. The war against Japan continued for another three months. Lothar Eisentrager and twenty others working in Germany's propaganda bureau in Shanghai suddenly found themselves stranded and jobless. They went to work for Japan, supplying the Japanese military with intercepted U.S. naval communications and German-made weapons. The United States Army captured the Germans and tried them in China for war crimes as nonresident enemy aliens. Since they had collaborated with the Japanese against the U.S. after Germany's unconditional surrender, they were convicted of violating of the laws of war and were then moved to Landsberg prison in the U.S.-occupied section of Germany. Eisentrager and the other defendants petitioned the District Court for the District of Columbia for a writ of *habeas corpus*, maintaining that their trial, conviction, and imprisonment violated various provisions of the U.S. Constitution and the Geneva Convention. They believed they should have had access to civilian courts rather than being tried by military commission. They asserted that the U.S. Constitution's guarantee of a writ of *habeas corpus* gave them the right to challenge their detention by the United States, wherever that detention occurred.

Justice Robert Jackson wrote for the majority in a 6-3 decision, rejecting the Germans' claims. The Court ruled that *habeas* relief from United States

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courts is not available to enemy aliens detained outside the United States, even though they were held in an area over which the U.S. held jurisdiction. Since they were held in Germany, the U.S. did not hold “ultimate sovereignty”:

“To grant the writ to these prisoners might mean that our army must transport them across the 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.... Executive power over enemy aliens, undelayed and unhampered by litigation, has been deemed, throughout our history, essential to war-time security. This is in keeping with the practices of the most enlightened of nations, and has resulted in treatment of alien enemies more considerate than that which has prevailed among any of our enemies and some of our allies. This statute was enacted or suffered to continue by men who helped found the Republic and formulate the Bill of Rights, and although it obviously denies enemy aliens the constitutional immunities of citizens, it seems not then to have been supposed that a nation’s obligations to its foes could ever be put on a parity with those to its defenders.”

Justice Hugo Black dissented, joined by Justices William O. Douglas and Harold Burton:

“Our constitutional principles are such that their mandate of equal justice under law should be applied as well when we occupy lands across the sea as when our flag flew only over thirteen colonies...Our nation proclaims a belief in the

dignity of human beings as such, no matter what their nationality or where they happen to live. *Habeas corpus*, as an instrument to protect against illegal imprisonment, is written into the Constitution...I would hold that our courts can exercise it whenever any United States official illegally imprisons any person in any land we govern. Courts should not for any reason abdicate this, the loftiest power with which the Constitution has endowed them.”

By 1950, the Truman administration had decided to treat German war criminals differently. John McCloy, the U.S. High Commissioner in Germany, established a clemency commission that reevaluated the cases of all prisoners at Landsberg, reducing many of their sentences. All of the Germans convicted in Shanghai were released in 1950.

In the majority decisions for both *Quirin* and *Eisentrager*, the Court upheld the constitutionality of the action the president and Congress had taken.

War on Terror

On September 11, 2001, al Qaeda, a militant Islamist organization led by Osama bin Laden, carried out a series of violent surprise attacks on the United States. Nineteen al Qaeda operatives hijacked four commercial airliners early that morning in order to carry out suicide attacks. In quick succession the hijackers deliberately crashed two of the planes into the twin towers of Manhattan’s World Trade Center and a third one into the Pentagon. When passengers on the fourth plane attempted to regain control of the flight, it crashed into a field near Shanksville, Pennsylvania. Fatalities from the four crashes included the airline passengers and crews, individuals inside the buildings hit, firefighters, and other first responders. Altogether, almost 3,000 people were killed in that morning’s terrorist assault.

In response to the worst terrorist attack in U.S. history, on September 14 Congress enacted the

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Authorization for Use of Military Force (AUMF). President George W. Bush announced a “War on Terror” in a televised address to a joint session of the U.S. Congress on September 20, 2001. The next month the U.S. launched and led Operation Enduring Freedom, an international military effort to remove the Taliban government in Afghanistan that harbored the al Qaeda network and its training facilities. In addition to the AUMF, Congress enacted more than a dozen other laws addressing related issues, including The USA PATRIOT Act, victims’ relief, air transportation, and national defense.

President Bush’s administration immediately began to manage individuals captured on the battlefield and suspected of committing or supporting acts of terrorism. U.S. and international law prescribe procedures to hold enemies captured on the battlefield, to interrogate and try them for violations of the laws of war, and to prevent them from returning to battle.

President Bush’s Military Order of November 13, 2001, provided for military commissions to try non-U.S. citizens who supported al Qaeda or other terrorist groups. Finding it impractical to apply the rules of evidence used in U.S. criminal trials, the administration recommended preparing a prison/interrogation facility at the U.S. Naval Base at Guantanamo Bay, Cuba. President Bush’s advisers believed that any proceedings conducted there related to the suspected terrorists would not be bound by the criminal protections of the U.S. Constitution.

Guantanamo Bay

Beginning in 1903, the U.S. leased from Cuba a 45-square-mile naval base on the coast of Guantanamo Bay. According to a 1934 treaty, the

U.S. Navy fully controls the base, but the Cuban government has ultimate sovereignty there. In the latter months of 2001, the U.S. prepared the base to function as a prison and interrogation center, which opened on January 11, 2002. In 2004 prosecutors brought charges against the first groups of suspected terrorists, including Salim Ahmed Hamdan.

Under the president’s direction, the secretary of defense developed military commission rules based on Congress’s Authorization for Use of Military Force. As of January 2004, the procedures implemented regarding detainees captured during conflict included the following:

- The right to be tried by a military commission consisting of a panel of at least three military officers before a presiding officer
- The right to a copy of the charges in English and in the language of the accused
- The presumption of innocence and other rights commonly afforded in courts-martial and civilian courts

Unlike the rules used in courts-martial for members of the U.S. military, however, military commission trials allow the following:

- Use of evidence against an accused which he has never seen
- Testimonial hearsay
- Unsworn testimony
- Evidence obtained through coercion
- Limited rights to appellate review

Over the next few years, the Supreme Court decided several cases concerning whether due process and fair trial guarantees applied to suspected terrorists captured in wartime.

Critical Thinking Questions

1. Compare and contrast the decisions in *Milligan*, *Quirin*, and *Eisentrager*.
2. How did the Roosevelt and Truman administrations treat enemy combatants during World War II?
3. How did the U.S. Supreme Court rule in decisions related to the detainment and military tribunals of enemy combatants by the Roosevelt and Truman administrations?
4. As of January 2004, to what extent were the actions taken by the Bush administration against enemy combatants during the war on terror consistent with precedents established by previous administrations in World War II?
5. Review the excerpts of the decisions written by Justices Jackson and Black, and summarize each in your own words. Explain which of these opinions, if either, you believe was correct. As you read about additional Supreme Court decisions, compare them to the Jackson and Black opinions.