

1947

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### Repository Citation

Gerald Theis, *Constitutional Law - Due Process and the Military Commission*, 30 Marq. L. Rev. 190 (1946).  
Available at: <https://scholarship.law.marquette.edu/mulr/vol30/iss3/4>

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## CONSTITUTIONAL LAW—DUE PROCESS AND THE MILITARY COMMISSION

Is our tradition of due process, with all its implications of an adequate hearing, reasonable opportunity to prepare and offer defense, and general fair play, compatible with the establishment of a specially constituted tribunal, which is to be the sole and exclusive arbiter of the credibility, probative value and admissibility of whatever may be tendered as evidence, or has the totalitarian ideology insidiously crept into and imparted a new concept to our military tribunals, which is in diametric opposition to the safeguards incorporated in the Federal Constitution by the great founders?

The right involved, which can have no existence under pagan authoritarianism, is of such a character that it cannot be denied without violating those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions".<sup>1</sup>

The jurisdiction of the military authority was overruled in *Ex Parte Milligan*.<sup>2</sup> Milligan, a citizen of the United States, and a resident of Indiana, was arrested at home, brought before a military commission, tried, found guilty, and sentenced to be hanged. The United States Supreme Court, in reversing the sentence, held that it was in contravention of Milligan's constitutional rights. The position was that the military had no jurisdiction, since Indiana was never invaded, and there was no pretext for martial law, which could only be proclaimed when the invasion was so real and present as effectually to close the civil courts and depose the civil administration.

"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."<sup>3</sup>

However, in the Saboteur Case, *Ex Parte Quirin*,<sup>4</sup> the military tribunal was upheld on other grounds. The saboteurs had landed on the Atlantic Coast from an enemy submarine, discarded their uniforms, and dispersed over the country in civilian dress. The jurisdiction of the military arm and the power of the military tribunal appointed by it, was held to be expressly recognized by Article of War 15 and by the Hague Convention, which defines persons who associate themselves with the military branch of the enemy government, and enter the country with hostile intentions to aid the enemy, as enemy belligerents.

1. *Hebert v. State of Louisiana*, 272 U.S. 312, 47 S. Ct. 103, 7 L.Ed. 270, 48 A.L.R. 1102 (1926).
2. 4 Wall. 2 (1866).
3. *Ibid.*, at page 127.
4. 317 U.S. 1 (1942).

The United States Supreme Court went back to the Revolutionary War and cited the jurisdiction of the military tribunal which tried Major Andre. It recognized the difference between lawful belligerents entitled to be treated as prisoners of war, and unlawful belligerents who pass through lines in civilian garb as enemy agents, as part of international law and provided for by Article of War 15, which was passed by Congress in accordance with international law.

The jurisdiction of the military commission was again upheld in the *Application of Yamashita*.<sup>5</sup> Yamashita was the commanding General of the Fourteenth Army Group of the Imperial Japanese Army in the Philippine Islands when he surrendered on September 3, 1945. On September 25th he was served with the charge preferred against him of a violation of the law of war. The charge was that Yamashita "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 . . ." thereby violated the laws of war. He was arraigned before the military commission on October 8th. He pleaded not guilty. He was also served on that day with a bill of particulars alleging sixty-four crimes by troops under his command. On October 29th, the day of the trial, a supplemental bill alleging further crimes by his troops was filed. He was not allowed a continuance for the preparation of a defense to this second bill. The supplemental bill was of the same general character as the first and contained fifty-nine more specifications.

The commission under the procedural regulations prescribed by General MacArthur was directed to admit such evidence "as in its opinion would be of assistance in proving or disproving the charge, or such as in the commission's opinion would have probative value in the mind of a reasonable man", and in particular it might admit affidavits, depositions, or other statements taken by officers detailed for that purpose by military authority. In five weeks the commission heard 286 witnesses and compiled over 3000 pages of testimony. Yamashita was convicted and sentenced to be hanged. The sentence was pronounced on December 7th, almost four years to the hour of Pearl Harbor.

The articles of war were held not applicable to the case, except insofar as they conferred jurisdiction. Therefore, the rules of admissibility of evidence and depositions as laid down in those articles were held not to apply. Newspapers, diaries, photographs and even hearsay

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5. 66 S. Ct. 340 (1946).

as far as three times removed were admitted in evidence. The article of the Geneva Convention providing that the same course and procedure were to be used on prisoners of war as used on soldiers of the detaining power, was held only to apply to sentences pronounced against a prisoner of war for an offense committed while a prisoner of war.

Yamashita was not charged with personally participating, or even having knowledge of the atrocities. The charge was simply that he had disregarded and failed to discharge his duty in permitting his troops to commit the atrocities. Justice Murphy, in his dissent, points out that Yamashita was in charge during the time of our air and land offensive, and that our objective was to disrupt communications and so isolate the enemy as to leave him powerless to defend the islands. He wonders how we can then try a general for failing to take action which it was our objective to make impossible.

Do the rights guaranteed by the due process clause belong only to the victor? If they do, in what way does this differ from the theory that "might is right"? Can right be destroyed by executive order or even by judicial order, or does it belong to every person in the world? In other words, does "any person" within the meaning of the Fifth Amendment, which guarantees due process of law to any person who is accused of a crime by the Federal Government or any of its agencies, apply to a commanding general of an enemy army being tried for violations of the law of war committed during hostilities and while not a prisoner of war?

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