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IN RE YAMASHITA

SUPREME COURT OF THE UNITED STATES
327 U.S. 1
February 4, 1946
[6 - 2][1]

[First, here is the time line.]

September 3, 1945	Japanese General Yamashita surrenders and becomes a prisoner of war of the U.S.
September 25, 1945	U.S. General Styer charges Yamashita with a violation of the law of war.
October 8, 1945	Trial begins before a military commission of five Army officers appointed by order of General Styer. Six Army officers, all lawyers, are appointed as defense counsel for Yamashita.
December 7, 1945	Trial concludes. Yamashita is found guilty and sentenced to death by hanging.

[1]Justice Jackson did not participate.

February 4, 1946 This Supreme Court decision is rendered.

[And, just to finish the story...]

February 23, 1946 General Yamashita is hanged in Manilla.

Surrender to Sentencing to Supreme Court Opinion to Hanging — (5+ months).

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OPINION: Chief Justice Stone...[Yamashita's petition for habeas corpus **argues**:

1. The military commission was not lawfully created and no military commission could be convened after cessation of hostilities to try him for violations of the law of war;

2. The charge against him is not a violation of the law of war;

3. The commission was without authority and jurisdiction to try and convict because the order governing the trial permitted hearsay and opinion evidence...in violation of the 25th and 38th Articles of War and the Geneva Convention and deprived him of a fair trial in violation of the due process clause of the Fifth Amendment;

4. The commission was without authority and jurisdiction because of the failure to give advance notice of the trial to the neutral power representing the interests of Japan as a belligerent as required by Article 60 of the Geneva Convention.]

Of course, the first place the *Yamashita* Court turned for guidance was the 1942 case of *Ex parte Quirin*. When you get to *Hamdan v Rumsfeld*, you will find that the issues are eerily similar – the result vastly different.

In *Ex parte Quirin*[2] we had occasion to consider at length the sources and nature of the authority to create military commissions for the trial of enemy combatants for offenses against the law of war. **We there pointed out that Congress**, in the exercise of the power conferred upon it by Article I, §8, Cl. 10 of the Constitution to "define and punish...Offences against the Law of Nations...," of which the law of war is a part, **had by the Articles of War recognized the "military commission" appointed by military command**, as it had previously existed in United States Army practice, **as an appropriate tribunal for the trial and punishment of offenses against the law of war**. **Article 15** declares that...

"**the provisions of these articles conferring jurisdiction upon courts martial shall**

[2]Case 2-9 on this website.

not be construed as depriving military commissions...of concurrent jurisdiction in respect of...offenses that by statute or by the law of war may be triable by such military commissions..."

Article 2 [subjects our own military personnel to court-marital, but that does not exclude trial of the enemy by military commission.]

A bit of history will help.

06/30/1775	The Second Continental Congress established 69 Articles of War to govern the conduct of the Continental Army.
04/10/1806	The First United States Congress enacted 101 Articles of War (which applied to both the Army and the Navy) and were not significantly revised until over a century later. **The military justice system continued to operate under these Articles of War until May 31, 1951.**
05/05/1950	The Uniform Code of Military Justice (UCMJ) was signed into law by President Truman.
05/31/1951	The UCMJ became effective. It is found in Title 10, Subtitle A, Part II, Chapter 47 of the United States Code.

Repeating — The Articles of War (in place from the beginning to 05/31/51) and the UCMJ (replacing the Articles of War) are, lest we forget, **Acts of Congress**!!!

We further pointed out [in *Quirin*] that Congress, by sanctioning trial of enemy combatants for violations of the law of war by military commission, had not attempted to codify the law of war or to mark its precise boundaries. Instead, by Article 15 it had incorporated, by reference, as within the pre-existing jurisdiction of military commissions created by appropriate military command, all offenses which are defined as such by the law of war, and which may constitutionally be included within that jurisdiction. It thus adopted the system of military common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts, and as further defined and supplemented by the Hague Convention, to which the United States and the Axis powers were parties.

We also emphasized in *Ex parte Quirin*, as we do here, that on application for habeas corpus we are not concerned with the guilt or innocence of the petitioners. We consider here only the lawful power of the commission to try the petitioner for the offense charged. **In the present cases it must be recognized throughout that the military tribunals which Congress has sanctioned by the Articles of War are not courts whose rulings and judgments are made subject to review by this Court.** They are tribunals whose determinations are reviewable by the military authorities either as

provided in the military orders constituting such tribunals or as provided by the Articles of War. **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 USC §§451*. The courts may inquire whether the detention complained of is within the authority of those detaining the petitioner. 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...

Translation: The judiciary might have a difference of opinion with the military on interpretation of disputed facts, but they will not undo a military decision on that basis alone.

Our first inquiry [is whether the commission] was created by lawful military command and, if so, whether [Yamashita could be tried after the cessation of hostilities between the U.S. and Japan.]

The authority to create the commission.

...The congressional recognition of military commissions and its sanction of their use in trying offenses against the law of war [**has long been recognized** in] American precedents...[This commission was properly created.] Winthrop, Military Law and Precedents. [This is a military treatise cited in *Hamdan*[3], as well]...In a proclamation of July 2, 1942, the President proclaimed that enemy belligerents who, during time of war, enter the United States, or any territory or possession thereof, and who violate the law of war, should be subject to the law of war and to the jurisdiction of military tribunals...The order was accompanied by detailed rules and regulations which General MacArthur prescribed for the trial of war criminals. These regulations directed...that review of the sentence imposed by the commission should be by the officer convening it...[and] no sentence of death should be carried into effect until confirmed by the **Commander in Chief**. It thus appears that the order creating the commission for the trial of petitioner was authorized by military command, and was in complete conformity to the Act of Congress sanctioning the creation of such tribunals for the trial of offenses against the law of war committed by enemy combatants.

Like *Quirin*, there was no "specific" Act of Congress setting up "this" military commission. The *Quirin* Court and the *Yamashita* Court relied solely on Article 15, a rather vague and open ended provision, for their source of "Congressional authority" to establish trial by military commission. At Guantanamo (see *Hamdan*), President Bush relied on Article 21 of the UCMJ (strikingly similar to Article 15 of the Articles of War) **and** the Authorization to Use Military Force in Iraq (AUMF) to form his military commissions. What result? Stay tuned!

[3]Case 2-20 on this website.

And we turn to the question whether the authority to create the commission and direct the trial by military order continued <u>after the cessation of hostilities</u>.

...The war power, from which the commission derives its existence, is not limited to victories in the field, but carries with it the inherent power to guard against the immediate renewal of the conflict, and to remedy, at least in ways Congress has recognized, the evils which the military operations have produced. We cannot say that there is no authority to convene a commission after hostilities have ended to try violations of the law of war committed before their cessation, at least until peace has been officially recognized by treaty or proclamation of the political branch of the Government...In our own military history there have been numerous [such] instances...

PLEASE REMEMBER THIS...There is absolutely no discussion in the majority opinion that in order for this military commission to proceed, the trial must be "militarily exigent" or "militarily necessary." That will mean more as we proceed on the *ℰℒℒ* journey!

<u>The charge</u>.

Neither congressional action nor the military orders constituting the commission authorized it to place Yamashita on trial <u>unless</u> the charge...is of a violation of the <u>law of war</u>. The charge...is that he...**failed to...control the operations of the members of his command, permitting them to commit brutal atrocities** [as set forth]...and he...thereby violated the laws of war.

...It is not denied that such [atrocities] directed against the civilian population of an occupied country and against prisoners of war are recognized in international law as violations of the law of war...It is urged that the charge does not allege that Yamashita has either committed or directed the commission of such acts, and consequently that no violation is charged as against him. But this overlooks the fact that **the gist of the charge is an unlawful breach of duty by Yamashita...to control** [those under his command] by "**<u>permitting them to commit</u>**" the extensive and widespread atrocities specified. **The question then is whether the law of war imposes on an army commander a duty to...control the troops under his command for the prevention of the specified acts which <u>are</u> violations of the law of war...and whether he may be charged with personal responsibility for his failure to take such measures when violations result...**

Keep this in mind when you get to *Hamdan*. Is the <u>failure to do something</u> (i.e., the failure to control his soldiers) an "overt act" of war? Either MacArthur did not have any evidence that Yamashita directly ordered the atrocities or he simply chose to take the easier route of proving the atrocities, hoping that would be enough to conclude Yamashita had "violated a duty" to prevent them. Would this be sufficient to justify a violation of the "law of war"? Read on.

...[T]he **<u>law of war presupposes</u>** that its violation is to be avoided through the control of the operations of war by commanders who are **<u>to some extent</u>** responsible for their subordinates...

[Yamashita had] an affirmative duty to take such measures as were within his power...to protect prisoners of war and the civilian population...

There is no contention that the...charge...[is unsupported by the 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. We do not here appraise the evidence on which petitioner was convicted. We do not consider what measures, if any, petitioner took to prevent the commission, by the troops under his command, of the plain violations of the law of war detailed in the bill of particulars, or whether such measures as he may have taken were appropriate and sufficient to discharge the duty imposed upon him. **These are questions within the peculiar competence of the military officers composing the commission and were for it to decide...**

"Right or wrong," "constitutional or otherwise" --
in 1946 –
the judiciary stayed out of decisions requiring "military competence,"
at least insofar as dealing with enemy combatants was concerned.

Charges of violations of the law of war triable before a military tribunal **need not be stated with the precision of a common law indictment**...[This charge adequately alleges a violation of the law of war and the commission had authority to try Yamashita.]

Neither were they particular about dotting their "i"s and crossing their "t"s, or so it would appear.
At least, when it came to handling enemy combatants!

The proceedings before the commission.

The regulations prescribed by General MacArthur governing [trial procedures]...directed that the commission should 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 that in particular it might admit affidavits, depositions or other statements taken by officers detailed for that purpose by military authority...[The commission]...admitted **hearsay and opinion evidence**...Yamashita argues...that Article 38 of the Articles of War prohibited...[hearsay and opinion evidence...]

OK...As you will see, Mr. Hamdan made similar complaints about the rules of evidence for his prospective trial by the Bush military tribunal. Watch how the *Yamashita* Court handles this one! Shall we say MacArthur had "home court advantage"?

Article 38 provides: "**The President may...prescribe the...modes of proof...**in cases before...

military commissions,...**which regulations shall** insofar as **HE** shall deem practicable **apply the rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States**: *Provided*, That nothing contrary to or inconsistent with these articles shall be so prescribed: . . ."

At least at first blush, it would appear that persons tried by military commission get the same rules of evidence that apply in the U.S. courts. Right?

[Article 38 does not apply to the trial of an enemy combatant by a military commission for violations of the law of war.] Article 2...enumerates "the persons...subject to these articles," who are denominated, for purposes of the Articles, as "persons subject to military law." In general, the persons so enumerated are members of our own Army and of the personnel accompanying the Army. **Enemy combatants are not included among them...**Article 15 [states]: "The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions...of concurrent jurisdiction in respect of offenders or offenses that...by the law of war may be triable by such military commissions."

[Therefore, **as we held in *Quirin***, **Article 15 did not confer benefits of the Articles upon persons not defined by Article 2**]...The Articles recognized but one kind of military commission, not two. But they sanctioned the use of that one for the trial of two classes of persons, to one of which the Articles do, and to the other of which they do not, apply in such trials. Being of this latter class, petitioner cannot claim the benefits of the Articles, which are applicable only to the members of the other class. Petitioner, an enemy combatant, is therefore not a person made subject to the Articles of War by Article 2, and the military commission before which he was tried, though sanctioned and its jurisdiction saved by Article 15, was not convened by virtue of the Articles of War, but pursuant to the common law of war. It follows that the Articles of War, including...Article 38, was not applicable to petitioner's trial and **imposed no restrictions upon the procedure to be followed**. **The Articles left the control over the procedure in such a case where it had previously been, with the military command.**

Hello!!! No inquiry was necessary into whether the President deemed Federal District Court Rules of Evidence **impracticable**! No restrictions except those imposed by the military – says the High Court in 1946!!! Why not? Because enemy combatants were not intended by Congress to get **any** benefits of the Articles of War!

Petitioner further urges that by virtue of Article 63 of the Geneva Convention of 1929, he is entitled to the benefits afforded by the 25th and 38th Articles of War to members of our own forces. Article 63 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**." Since petitioner is a prisoner of war, and as the 25th and 38th Articles of War apply to the trial of any person in our own armed forces, it is said that Article 63 requires them

to be applied in the trial of petitioner. But we think examination of Article 63 in its setting in the Convention plainly shows that it refers to sentence "pronounced against a prisoner of war" **for an offense committed while a prisoner of war, and not for a violation of the law of war committed while a combatant**.

I will admit that, just as I contend the *Hamdan* Court has worked overtime against President Bush to contrive a position contrary to every one taken by this Administration, it appears the *Yamashita* Court has done the same to the General. It is a stretch to conclude that Article 63 was meant to apply only to charges for "acts done while a POW." This, at a minimum, demonstrates the "attitudinal swing" from the 40's to the new millennium.

[The Court then discusses its position that the provisions of the Geneva Convention seem to be referencing only the actions of prisoners done "while in captivity."]

We cannot say that the commission...violated any act of Congress, treaty or military command defining the commission's authority...**The commission's rulings on evidence and on the mode of conducting these proceedings...are not reviewable by the courts, but only by the reviewing military authorities.** From this viewpoint it is unnecessary to consider what, in other situations, the Fifth Amendment [due process] might require, and as to that no intimation one way or the other is to be implied. Nothing we have said is to be taken as indicating any opinion on the question of the wisdom of considering such evidence, or whether the action of a military tribunal in admitting evidence, which Congress **or** controlling military command has directed to be excluded, may be drawn in question by petition for habeas corpus...

Compare *Hamdan v Rumsfeld*.

Effect of failure to give notice of the trial to the protecting power.

[Article 60 of the Geneva Convention requires a detaining Power to give notice to the representative of the protecting power (here, the representative is Switzerland, the protecting power is Japan) in advance of trial of a prisoner of war. Again, the Court finds it does not apply as the Convention only addresses acts committed while a POW.]

The commission made no finding of non-compliance with the Geneva Convention. Nothing has been brought to our attention from which we could conclude that the alleged non-compliance with Article 60 of the Geneva Convention had any relation to the commission's finding of a series of atrocities committed by members of the forces under petitioner's command, and that he failed to provide effective control of his troops, as was required by the circumstances; or which could support the petitions for habeas corpus on the ground that petitioner had been charged with or convicted for failure to require the notice prescribed by Article 60 to be given...

We therefore conclude that the detention of petitioner for trial and his detention upon his conviction...were lawful...

DISSENT: Justice Murphy...The Fifth Amendment guarantee of due process of law applies to "any person"...[Any] exception would be contrary to the whole philosophy of human rights which makes the Constitution the great living document that it is...**[These rights] belong to every person in the world, victor or vanquished...**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...

Except in theory, perhaps a bit over the top, for "these rights" can, indeed, be destroyed by "the mightiest army in the world" or by "apathy" or "ignorance." I must say that Justice Murphy's writing, in dissent, is certainly eloquent, as you will see. And, until possibly recently, these "rights" have never been thought to be owed to every person in the world.

[These rights]...cannot be ignored by...the military, **except under the most extreme and urgent circumstances**.

He leaves an "out" here. Will he explain what those "extreme and urgent circumstances" are? Unfortunately, the answer is "no."

The failure of the military commission to obey the dictates of the...Fifth Amendment is apparent in this case...While under heavy...attack by our forces, Yamashita's troops committed many brutal atrocities...Hostilities ceased and he voluntarily surrendered. At that point he was entitled...to be treated fairly and justly according to the accepted rules of law and procedure...**No military necessity or...emergency demanded the suspension of the safeguards of due process.**

As you will seen in *Hamdan*, I question whether the Supreme Court has **ever** defined "military necessity." Nor does Justice Murphy, except to say that, in his opinion, "whatever it is, this it is not." He is also mixing apples and oranges. "Military necessity" seems to be tied to "trial by military commission." But the degree of "due process" required by law is not "necessarily" dependent upon "military necessity."

Yet he was rushed to trial under an improper charge, given insufficient time to prepare an adequate defense, deprived of the benefits of some of the most elementary rules of evidence and summarily sentenced to be hanged. In all this needless and unseemly haste there was no serious attempt to charge or to prove that he committed a recognized violation of the laws of war. He was not charged with personally participating in the acts of atrocity or with ordering or condoning their commission. Not even knowledge of these crimes was attributed to him. It was

simply alleged that he unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit the acts of atrocity...

In my opinion, such a procedure is unworthy of the traditions of our people or of the immense sacrifices that they have made to advance the common ideals of mankind...That just punishment should be meted out to all those responsible for criminal acts...is...beyond dispute. But these [crimes]...do not justify the abandonment of our devotion to justice in dealing with a fallen enemy commander. **To conclude otherwise is to admit that the enemy has lost the battle but has destroyed our ideals...**

I am finding that these cases, majority opinions and dissenting ones alike, are helping to form my own beliefs. Do you find that to be true for yourself?

For...purposes of this case, I accept the scope of review recognized by the Court...As I understand it, the following issues...are reviewable through the use of the writ of habeas corpus: (1) whether the military commission was lawfully created...; (2) whether the charge...stated a violation of the laws of war; (3) whether the commission's [evidentiary rules] violated any law...; and (4) whether the commission lacked jurisdiction because of a failure to give advance notice to the protecting power as required by treaty or convention...

[Clearly,] the military commission was lawfully created...[but, I cannot agree that] the charge...stated a recognized violation of the laws of war.

...[O]n January 9, 1945, the island of Luzon was invaded. "Yamashita's inability to cope with General MacArthur's swift moves, his desired reaction to the deception measures, the guerrillas, and General Kenney's aircraft combined to place the Japanese in an impossible situation. The enemy was forced into a piecemeal commitment of his troops." It was at this time and place that most of the alleged atrocities took place. Organized resistance around Manila ceased on February 23. Repeated land and air assaults pulverized the enemy and within a few months there was little left of Yamashita's command... As the military commission here noted, "The Defense established the difficulties faced by the Accused with respect not only to the swift and overpowering advance of American forces, but also to the errors of his predecessors, weaknesses in organization, equipment, supply with especial reference to food and gasoline, training, communication, discipline and morale of his troops...This situation was followed, the Defense contended, by failure to obey his orders to withdraw troops from Manila, and the subsequent massacre of unarmed civilians..."

On September 3, [1945], Yamashita surrendered ... On September 25...he was served with the charge in issue in this case...[and] with a bill of particulars alleging 64 crimes by troops under his command. A supplemental bill alleging 59 more crimes by his troops was filed on October 29, **the same day that the trial began**. **No continuance was allowed for preparation of a defense** as to the supplemental bill...On **December 7** petitioner was found guilty...and was sentenced to be hanged.

...Nowhere was it alleged that Yamashita personally committed any of the atrocities, or that he ordered their commission, or that he had any knowledge of the commission thereof by members of his command...The commission merely found that atrocities..."have been committed by members of the Japanese armed forces under his command...; that they were not sporadic in nature but in many cases were methodically supervised by Japanese officers and noncommissioned officers; [and that he]...failed to provide effective control of [his] troops as was required by the circumstances."

In other words,...these charges amount to this: "We, the victorious American forces, have [successfully] done everything possible to destroy and disorganize your lines of communication, your effective control of your personnel, and your ability to wage war...We have defeated and crushed your forces. And now we charge and condemn you for having been inefficient in maintaining control of your troops during the period when we were so effectively besieging and eliminating your forces and blocking your ability to maintain effective control. Many terrible atrocities were committed by your disorganized troops. Because these atrocities were so widespread we will not bother to charge or prove that you committed, ordered or condoned any of them. We will assume that they must have resulted from your inefficiency and negligence as a commander. In short, we charge you with the crime of inefficiency in controlling your troops. We will judge the discharge of your duties by the disorganization which we ourselves created in large part. Our standards of judgment are whatever we wish to make them."

A very bold dissent at the time! I wonder what the public reaction was!

...To use...inefficiency and disorganization created by the victorious forces as the primary basis for condemning officers of the defeated armies bears no resemblance to justice or to military reality.

International law makes no attempt to define the duties of a commander of an army under constant and overwhelming assault; nor does it impose liability under such circumstances for failure to meet the ordinary responsibilities of command. The omission is understandable. Duties, as well as ability to control troops, vary according to the nature and intensity of the particular battle. To find an unlawful deviation from duty under battle conditions requires difficult and speculative calculations. Such calculations become highly untrustworthy when they are made by the victor in relation to the actions of a vanquished commander. Objective and realistic norms of conduct are then extremely unlikely to be used in forming a judgment as to deviations from duty. The probability that vengeance will form the major part of the victor's judgment is an unfortunate but inescapable fact. So great is

that probability that **international law refuses to recognize such a judgment as a basis for a war crime**, however fair the judgment may be in a particular instance. It is this consideration that undermines the charge against the petitioner in this case...Life and liberty are made to depend upon the biased will of the victor rather than upon objective standards of conduct...

[The] Basic Field Manual [of the] Rules of Land Warfare states the principal offenses under the laws of war recognized by the United States. This includes all of the atrocities which the Japanese troops were alleged to have committed...Originally [the Manual] concluded with the statement that **"The commanders ordering the commission of such acts, or under whose authority they are committed by their troops, may be punished by the belligerent into whose hands they may fall."**...On November 15, 1944, however, **this sentence was deleted** and a new paragraph was added relating to the personal liability of those who violate the laws of war. The new paragraph 345.1 states that "Individuals...who violate the accepted laws and customs of war may be punished therefor. However, the fact that the acts complained of were done **pursuant to order** of a superior or government sanction may be taken into consideration in determining culpability, either by way of defense or in mitigation of punishment. The person giving such orders may also be punished." From this the conclusion seems inescapable that the United States **recognizes individual criminal responsibility** for violations of the laws of war **only as to those who commit the offenses or who order or direct their commission**. Such was not the allegation here...

No one denies that inaction or negligence may give rise to liability, civil or criminal. But it is quite another thing to say that the inability to control troops under highly competitive and disastrous battle conditions renders one guilty of a war crime in the absence of personal culpability. **Had there been some element of knowledge or direct connection with the atrocities, the problem would be entirely different**...The only conclusion I can draw is that the charge made against the petitioner is clearly without precedent in international law or in the annals of recorded military history...

The trial proceeded with great dispatch without allowing the defense time to prepare an adequate case. Yamashita's rights under the due process clause of the Fifth Amendment were grossly and openly violated without any justification...[T]he loose charge was made that great numbers of atrocities had been committed and that Yamashita was the commanding officer; hence he must have been guilty of disregard of duty. Under that charge the commission was free to establish whatever standard of duty...it desired. **By this flexible method a victorious nation may convict and execute any or all leaders of a vanquished foe, depending upon the prevailing degree of vengeance and the absence of any objective judicial review.**

...While peoples in other lands may not share our beliefs as to due process and the dignity of the individual, we are not free to give effect to our emotions in reckless disregard of the rights of others. We live under the Constitution, which is the embodiment of all the high hopes and aspirations of the new world...We must act accordingly. Indeed, an uncurbed spirit of revenge and retribution, masked in formal legal procedure for purposes of dealing with a fallen enemy commander, can do more lasting harm than all of the atrocities giving rise to that spirit.

The people's faith in the fairness and objectiveness of the law can be seriously undercut by that spirit. The fires of nationalism can be further kindled. And the hearts of all mankind can be embittered and filled with hatred, leaving forlorn and impoverished the noble ideal of malice toward none and charity to all...

The Bush military tribunals, as you will see, provide far more rules in favor of GTMO detainees than this tribunal under FDR. In my estimation, to anyone with the knowledge of what has gone on before, those who suggest Bush is the worst President when it comes to honoring constitutional standards are either ignorant or have reason to intentionally deceive. I don't like being deceived, but one can never know the truth until he searches for it.

DISSENT: Justice Rutledge...More is at stake than General Yamashita's fate. There could be no possible sympathy for him if he is guilty of the atrocities for which his death is sought. But there can be and should be justice administered according to law. In this stage of war's aftermath it is too early for Lincoln's great spirit, best lighted in the Second Inaugural, to have wide hold for the treatment of foes. **It is not too early, it is never too early, for the nation steadfastly to follow its great constitutional traditions, none older or more universally protective against unbridled power than due process of law in the trial and punishment of men, that is, of all men, whether citizens, aliens, alien enemies or enemy belligerents. It can become too late. This long-held attachment marks the great divide between our enemies and ourselves...**

One basic protection of our system and one only, petitioner has had. He has been represented by able counsel, officers of the army he fought. Their difficult assignment has been done with extraordinary fidelity, not only to the accused, but to their high conception of military justice...But, as will appear, even this conceded shield was taken away in much of its value, by denial of reasonable opportunity for them to perform their function...[T]he commission was without jurisdiction [but, if not,]...its power to proceed was lost in the course of what was done before and during trial.

Only on one view, in my opinion, could either of these conclusions be avoided. This would be that an enemy belligerent in petitioner's position is altogether beyond the pale of constitutional protection, regardless of the fact that hostilities had ended and he had surrendered with his country. The Government has so argued, urging that we are still at war with Japan and all the power of the military effective during active hostilities in theatres of combat continues in full force unaffected by the events of August 14, 1945, and after.

In this view the action taken here is one of **military necessity**, exclusively within the authority of the President as Commander-in-Chief and his military subordinates to take in warding off military danger and subject to no judicial restraint...As I understand the Court, this is in substance the effect of what has been done. For I cannot conceive any instance of departure from our basic concepts of fair trial, if the failures here are not sufficient to produce that effect.

We are technically still at war, because peace has not been negotiated finally or declared. But there

is no longer the danger which always exists before surrender and armistice. Military necessity does not demand the same measures...**Ample power there is to punish them or others for crimes, whether under the laws of war during its course or later during occupation**. There can be no question of that. The only question is how it shall be done, consistently with universal constitutional commands or outside their restricting effects...**The purpose of battle is to kill. But it does not follow that this would justify killing by trial**...

When Justices are passionate about an issue, their message is crystal clear.

Invalidity of the Commission.

...General MacArthur's directive...was accompanied by elaborate and detailed rules and regulations prescribing the procedure and rules of evidence to be followed...§16 [of those rules] permits... **hearsay** [and] opinion evidence...[or] **anything which in the commission's opinion "would be of assistance in proving or disproving the charge**" without any of the usual modes of authentication ...[T]he directive made the commission a law unto itself...[T]here is not a suggestion in the findings that petitioner personally participated in, was present at the occurrence of, or ordered any of these incidents, with the exception of the wholly inferential suggestion noted below. Nor is there any express finding that he knew of any one of the incidents in particular or of all taken together. The only inferential findings that he had knowledge, or that the commission so found, are in the statement that..."the Prosecution presented evidence to show that the crimes were so extensive and widespread...that *they must* either have been *wilfully permitted* by the Accused, *or secretly ordered* by him..." Indeed the commission's ultimate findings draw no express conclusion of knowledge, but state only two things: (1) the fact of widespread atrocities and crimes; (2) that petitioner "failed to provide effective control...as was required by the circumstances."

Petitioner asserts, and there can be no reason to doubt, that by the use of all this forbidden evidence he was deprived of the right of cross-examination and other means to establish the credibility of the deponents or affiants, not to speak of the authors of reports, letters, documents and newspaper articles; of opportunity to determine whether the multitudinous crimes specified in the bills were committed in fact by troops under his command or by naval or air force troops not under his command at the time alleged; to ascertain whether the crimes attested were isolated acts of individual soldiers or were military acts committed by troop units acting under supervision of officers; and, finally, whether in short, there was such a 'pattern' of conduct as the prosecution alleged and its whole theory of the crime and the evidence required to be made out...

[The dissent decries both the "rules of the game" and the invalidity of the charge; i.e., that there was no "knowledge" or "intent" or even "negligence" requirement in the charged crime.]

Denial of Opportunity to Prepare Defense.

...[T]hree weeks before the trial began, petitioner was served with a bill of particulars specifying 64

items setting forth a vast number of atrocities and crimes allegedly committed by troops under his command. The six officers appointed as defense counsel thus had three weeks...to investigate and prepare to meet all these items and the large number of incidents they embodied, many of which had occurred in distant islands of the archipelago...[T]hey worked night and day at the task. Even so it would have been impossible to do thoroughly, had nothing more occurred. But there was more. On the first day of the trial...the prosecution filed a supplemental bill of particulars, containing 59 more specifications of the same general character, involving perhaps as many incidents occurring over an equally wide area. A copy had been given the defense three days earlier. **One item, No. 89, charged that American soldiers, prisoners of war, had been tried and executed without notice having been given to the protecting power of the United States in accordance with the requirements of the Geneva Convention, which it is now argued, strangely, the United States was not required to observe as to petitioner's trial**.

But what is more important is that defense counsel, as they felt was their duty, at once moved for a continuance. The application was denied...The burden placed upon the defense...was an impossible one...This sort of thing has no place in our system of justice, civil or military...

Applicability of the Articles of War.

The Court's opinion puts the proceeding and the petitioner, in so far as any rights relating to his trial and conviction are concerned, wholly outside the Articles of War. In view of what has taken place, I think the decision's necessary effect is also to place them entirely beyond limitation and protection, respectively, by the Constitution. I disagree as to both conclusions or effects...I think Articles 25 and 38 are applicable to this proceeding; that the provisions of the governing directive in §16 are in direct conflict with those Articles; and for that reason the commission was invalidly constituted, was without jurisdiction, and its sentence is therefore void.

The Geneva Convention of 1929.

If the provisions of Articles 25 and 38 were not applicable to the proceeding by their own force as Acts of Congress, I think they would still be made applicable by virtue of the terms of the Geneva Convention of 1929, in particular Article 63. And in other respects, in my opinion, the petitioner's trial was not in accord with that treaty, namely, with Article 60...The chief argument is that Articles 60 and 63 have reference only to offenses committed by a prisoner of war **while a prisoner of war** and not to violations of the laws of war committed **while a combatant**...The argument is in essence of the same type as the argument the Court employs to nullify the application of Articles 25 and 38 of the Articles of War by restricting their own broader coverage by reference to Article 2.

Neither Article 60 nor Article 63 contains such a restriction of meaning as the Court reads into them. In the absence of any such limitation, it would seem that they were intended to cover all judicial proceedings, whether instituted for crimes allegedly committed before capture or later. Policy supports this view. **For such a construction is required for the security of our own soldiers, taken prisoner, as much as for that of prisoners we take. And the opposite one leaves prisoners of war**

open to any form of trial and punishment for offenses against the laws of war their captors may wish to use, while safeguarding them, to the extent of the treaty limitations, in cases of disciplinary offense. This, in many instances, would be to make the treaty strain at a gnat and swallow the camel.

The United States has complied with neither of these Articles. It did not notify the protecting power of Japan in advance of trial as Article 60 requires it to do...It is said that, although this may be true, the proceeding is not thereby invalidated. The argument is that our non-compliance merely gives Japan a right of indemnity against us and that Article 60 was not intended to give Yamashita any personal rights. I cannot agree...**Executed men are not much aided by post-war claims for indemnity.** I do not think the adhering powers' purpose was to provide only for such ineffective relief.

Finally, the Government has argued that Article 60 has no application after the actual cessation of hostilities, as there is no longer any need for an intervening power between the two belligerents. The premise is that Japan no longer needs Switzerland to intervene with the United States to protect the rights of Japanese nationals, since Japan is now in direct communication with this Government. This of course is in contradiction of the Government's theory, in other connections, that the war is not over and military necessity still requires use of all the power necessary for actual combat.

Furthermore the premise overlooks all the realities of the situation. Japan is a defeated power, having surrendered, if not unconditionally then under the most severe conditions. Her territory is occupied by American military forces. She is scarcely in a position to bargain with us or to assert her rights...She no longer holds American prisoners of war. Certainly, if there was the need of an independent neutral to protect her nationals during the war, there is more now. In my opinion the failure to give the notice required by Article 60 is only another instance of the commission's failure to observe the obligations of our law.

What is more important, there was no compliance with Article 63 of the same Convention. Yamashita was not tried "according to the same procedure as in the case of persons belonging to the armed forces of the detaining Power." Had one of our soldiers or officers been tried for alleged war crimes, he would have been entitled to the benefits of the Articles of War. I think that Yamashita was equally entitled to the same protection. In any event, he was entitled to their benefits under the provisions of Article 63 of the Geneva Convention...

The Fifth Amendment.

...I am completely unable to accept or to understand the Court's ruling concerning the applicability of the due process clause of the Fifth Amendment to this case...Apart from a tribunal concerned that the law as applied shall be an instrument of justice,...the heart of the security lies in two things. One is that conviction shall not rest in any essential part upon unchecked rumor, report, or the results of the prosecution's ex parte investigations, but shall stand on proven fact; the other...lies in a fair chance to defend. This embraces at the least the rights to know with reasonable clarity in advance of the trial the exact nature of the offense with which one is to be charged; to have reasonable time for preparing

to meet the charge and to have the aid of counsel in doing so, as also in the trial itself; and if, during its course, one is taken by surprise, through the injection of new charges or reversal of rulings which brings forth new masses of evidence, then to have further reasonable time for meeting the unexpected shift.

So far as I know, it has not yet been held that any tribunal in our system, of whatever character, is free to receive such evidence "as *in its opinion* would be *of assistance* in proving or disproving the charge," or, again as in its opinion, "would have probative value in the mind of a reasonable man"...

All this the Court puts to one side with the short assertion that no question of due process under the Fifth Amendment or jurisdiction reviewable here is presented. I do not think this meets the issue, standing alone or in conjunction with the suggestion which follows that the Court gives no intimation one way or the other concerning what Fifth Amendment due process might require in other situations...The difference between the Court's view of this proceeding and my own comes down in the end to the view, on the one hand, that there is no law restrictive upon these proceedings other than whatever rules and regulations may be prescribed for their government by the executive authority or the military and, on the other hand, that the provisions of the Articles of War, of the Geneva Convention and the Fifth Amendment apply.

I cannot accept the view that anywhere in our system resides or lurks a power so unrestrained to deal with any human being through any process of trial. What military agencies or authorities may do with our enemies in battle or invasion, apart from proceedings in the nature of trial and some semblance of judicial action, is beside the point. Nor has any human being heretofore been held to be wholly beyond elementary procedural protection by the Fifth Amendment. I cannot consent to even implied departure from that great absolute.

[Thomas Paine, a great patriot, said:]

"He that would make his own liberty secure must guard even his enemy from oppression;
for if he violates this duty he establishes a precedent that will reach to himself."