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Erwin Chemerinsky

2004 Supplement

# Constitutional Law

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**ASPEN**  
PUBLISHERS

**2004 Supplement**

# **Constitutional Law**

**Erwin Chemerinsky**

*Alston and Bird Professor of Law*

*Duke Law School*

**ASPEN**  
PUBLISHERS

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## *Introduction*

### *Are Military Tribunals Constitutional?*

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The tragic events of September 11, 2001, have led to many government actions that will raise important difficult constitutional questions: Is the indefinite detention of “unlawful combatants” constitutional? Are secret deportation proceedings constitutional? Is it permissible for the government to hold individuals indefinitely as “material witnesses”? Are provisions of the USA Patriot Act, which include expanded authorization for electronic eavesdropping by the government, constitutional? Although many of these questions are beyond the scope of a traditional constitutional law course (many are more commonly covered in Criminal Procedure or other classes), one important issue likely to be discussed in constitutional law classes is whether President George W. Bush’s order for military tribunals is constitutional.

The order for military tribunals raises many basic questions: Does the President, as Commander-in-Chief, have the authority to create military tribunals or is creating courts entirely a congressional power under the Constitution? Can the government suspend provisions of the Bill of Rights in trying noncitizens accused of terrorism or supporting terrorism? More generally, how should the Constitution be interpreted during war time?

To facilitate discussion of these issues, below is President Bush’s Executive Order for military tribunals, followed by a summary of the “Procedures for Trials by Military Commissions,” promulgated by the Department of Defense in March 2002. After these materials, the only Supreme Court case on the issue of military tribunals is presented: Ex parte Quirin, from 1942. A crucial question will be whether *Quirin* provides adequate authority for President Bush’s action or whether it is distinguishable. Also, the underlying issue is whether *Quirin* was properly decided in allowing military tribunals.

#### DETENTION, TREATMENT, AND TRIAL OF CERTAIN NON-CITIZENS IN THE WAR AGAINST TERRORISM

November 13, 2001

66 FR 57833

By the authority vested in me as President and as Commander in Chief of the Armed Forces of the United States by the Constitution and the laws of the United

\*The Supreme Court’s decision in *Hamdi v. Rumsfeld* on this issue is presented below in Chapter 3 of this Supplement.

States of America, including the Authorization for Use of Military Force Joint Resolution and sections 821 and 836 of title 10, United States Code, it is hereby ordered as follows:

#### SECTION 1. FINDINGS

(a) International terrorists, including members of al Qaida, have carried out attacks on United States diplomatic and military personnel and facilities abroad and on citizens and property within the United States on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces.

(b) In light of grave acts of terrorism and threats of terrorism, including the terrorist attacks on September 11, 2001, on the headquarters of the United States Department of Defense in the national capital region, on the World Trade Center in New York, and on civilian aircraft such as in Pennsylvania, I proclaimed a national emergency on September 14, 2001.

(c) Individuals acting alone and in concert involved in international terrorism possess both the capability and the intention to undertake further terrorist attacks against the United States that, if not detected and prevented, will cause mass deaths, mass injuries, and massive destruction of property, and may place at risk the continuity of the operations of the United States Government.

(d) The ability of the United States to protect the United States and its citizens, and to help its allies and other cooperating nations protect their nations and their citizens, from such further terrorist attacks depends in significant part upon using the United States Armed Forces to identify terrorists and those who support them, to disrupt their activities, and to eliminate their ability to conduct or support such attacks.

(e) To protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order pursuant to section 2 hereof to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals.

(f) Given the danger to the safety of the United States and the nature of international terrorism, and to the extent provided by and under this order, I find consistent with section 836 of title 10, United States Code, that it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.

(g) Having fully considered the magnitude of the potential deaths, injuries, and property destruction that would result from potential acts of terrorism against the United States, and the probability that such acts will occur, I have determined that an extraordinary emergency exists for national defense purposes, that this emergency constitutes an urgent and compelling government interest, and that issuance of this order is necessary to meet the emergency.

## SECTION 2. DEFINITION AND POLICY

(a) The term “individual subject to this order” shall mean any individual who is not a United States citizen with respect to whom I determine from time to time in writing that:

- (1) there is reason to believe that such individual, at the relevant times,
  - (i) is or was a member of the organization known as al Qaida;
  - (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or
  - (iii) has knowingly harbored one or more individuals described in subparagraphs (i) or (ii) of subsection 2(a)(1) of this order; and

(2) it is in the interest of the United States that such individual be subject to this order.

(b) It is the policy of the United States that the Secretary of Defense shall take all necessary measures to ensure that any individual subject to this order is detained in accordance with section 3, and, if the individual is to be tried, that such individual is tried only in accordance with section 4.

(c) It is further the policy of the United States that any individual subject to this order who is not already under the control of the Secretary of Defense but who is under the control of any other officer or agent of the United States or any State shall, upon delivery of a copy of such written determination to such officer or agent, forthwith be placed under the control of the Secretary of Defense.

## SECTION 3. DETENTION AUTHORITY OF THE SECRETARY OF DEFENSE

Any individual subject to this order shall be—

- (a) detained at an appropriate location designated by the Secretary of Defense outside or within the United States;
- (b) treated humanely, without any adverse distinction based on race, color, religion, gender, birth, wealth, or any similar criteria;
- (c) afforded adequate food, drinking water, shelter, clothing, and medical treatment;
- (d) allowed the free exercise of religion consistent with the requirements of such detention; and
- (e) detained in accordance with such other conditions as the Secretary of Defense may prescribe.

## SECTION 4. AUTHORITY OF THE SECRETARY OF DEFENSE REGARDING TRIALS OF INDIVIDUALS SUBJECT TO THIS ORDER

(a) Any individual subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission that such

individual is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including life imprisonment or death.

(b) As a military function and in light of the findings in section 1, including subsection (f) thereof, the Secretary of Defense shall issue such orders and regulations, including orders for the appointment of one or more military commissions, as may be necessary to carry out subsection (a) of this section.

(c) Orders and regulations issued under subsection (b) of this section shall include, but not be limited to, rules for the conduct of the proceedings of military commissions, including pretrial, trial, and post-trial procedures, modes of proof, issuance of process, and qualifications of attorneys, which shall at a minimum provide for—

(1) military commissions to sit at any time and any place, consistent with such guidance regarding time and place as the Secretary of Defense may provide;

(2) a full and fair trial, with the military commission sitting as the triers of both fact and law;

(3) admission of such evidence as would, in the opinion of the presiding officer of the military commission (or instead, if any other member of the commission so requests at the time the presiding officer renders that opinion, the opinion of the commission rendered at that time by a majority of the commission), have probative value to a reasonable person;

(4) in a manner consistent with the protection of information classified or classifiable under Executive Order 12958 of April 17, 1995, as amended, or any successor Executive Order, protected by statute or rule from unauthorized disclosure, or otherwise protected by law, (A) the handling of, admission into evidence of, and access to materials and information, and (B) the conduct, closure of, and access to proceedings;

(5) conduct of the prosecution by one or more attorneys designated by the Secretary of Defense and conduct of the defense by attorneys for the individual subject to this order;

(6) conviction only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present;

(7) sentencing only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present; and

(8) submission of the record of the trial, including any conviction or sentence, for review and final decision by me or by the Secretary of Defense if so designated by me for that purpose.

#### SECTION 5. OBLIGATION OF OTHER AGENCIES TO ASSIST THE SECRETARY OF DEFENSE

Departments, agencies, entities, and officers of the United States shall, to the maximum extent permitted by law, provide to the Secretary of Defense such assistance as he may request to implement this order.

## SECTION 6. ADDITIONAL AUTHORITIES OF THE SECRETARY OF DEFENSE

(a) As a military function and in light of the findings in section 1, the Secretary of Defense shall issue such orders and regulations as may be necessary to carry out any of the provisions of this order.

(b) The Secretary of Defense may perform any of his functions or duties, and may exercise any of the powers provided to him under this order (other than under section 4(c)(8) hereof) in accordance with section 113(d) of title 10, United States Code.

## SECTION 7. RELATIONSHIP TO OTHER LAW AND FORUMS

(a) Nothing in this order shall be construed to—

(1) authorize the disclosure of state secrets to any person not otherwise authorized to have access to them;

(2) limit the authority of the President as Commander in Chief of the Armed Forces or the power of the President to grant reprieves and pardons; or

(3) limit the lawful authority of the Secretary of Defense, any military commander, or any other officer or agent of the United States or of any State to detain or try any person who is not an individual subject to this order.

(b) With respect to any individual subject to this order—

(1) military tribunals shall have exclusive jurisdiction with respect to offenses by the individual; and

(2) the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or 57836 proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.

(c) This order is not intended to and does not create any right, benefit, or privilege, substantive or procedural, enforceable at law or equity by any party, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person.

(d) For purposes of this order, the term "State" includes any State, district, territory, or possession of the United States.

(e) I reserve the authority to direct the Secretary of Defense, at any time hereafter, to transfer to a governmental authority control of any individual subject to this order. Nothing in this order shall be construed to limit the authority of any such governmental authority to prosecute any individual for whom control is transferred.

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On March 21, 2002, the Department of Defense issued Military Commission Order No. 1, "Procedures for Trials by Military Commissions of Certain Non-

United States Citizens in the War Against Terrorism.”\* The order provides that military commissions shall have between three and seven judges, each of whom “shall be a commissioned officer of the United States Armed Forces.” Additionally, both prosecutors and defense counsel shall be military officers, though the order also provides that the accused “may also retain the services of a civilian attorney of the Accused’s own choosing and at no expense to the United States.”

The procedures provide that the accused shall have notice of the charges and “be presumed innocent until proven guilty.” A Commission member may vote for a guilty verdict “if and only if that member is convinced beyond a reasonable doubt, based on the evidence admitted at trial that the Accused is guilty of the crime.” An accused cannot be required to testify at trial and no adverse inference can be drawn from a defendant’s choice not to testify. The accused may obtain witnesses and documents and may present evidence and cross-examine adverse witnesses. There is a presumption of openness for trials, but the Presiding Officer may close them when deemed necessary.

If there is a conviction, the Secretary of Defense shall designate a review panel consisting of three military officers. The review panel makes a recommendation to the Secretary of Defense who makes the final decision, unless the matter is referred to the President for the final decision. The order provides: “After review by the Secretary of Defense, the record of trial and recommendations will be forwarded to the President for review and final decision (unless the President has designated the Secretary of Defense to perform this function).” No judicial review in any court is provided for or authorized.

There is one major Supreme Court decision concerning military tribunals: *Ex parte Quirin*, from World War II:

### EX PARTE QUIRIN

317 U.S. 1 (1942)

Chief Justice STONE delivered the opinion of the Court.

The question for decision is whether the detention of petitioners by respondent for trial by Military Commission, appointed by Order of the President of July 2, 1942, on charges preferred against them purporting to set out their violations of the law of war and of the Articles of War, is in conformity to the laws and Constitution of the United States.

After denial of their applications by the District Court, petitioners asked leave to file petitions for habeas corpus in this Court. In view of the public importance of the questions raised by their petitions and of the duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty, and because in our opinion the public interest required that we consider and decide those questions without any avoidable delay,

\*As of July 1, 2003, no military tribunals have yet been used. However, recent news stories have reported that the Department of Defense is preparing to convene military tribunals for some of the prisoners being held in Guantanamo.



we directed that petitioners' applications be set down for full oral argument at a special term of this Court, convened on July 29, 1942.

The following facts appear from the petitions or are stipulated. Except as noted they are undisputed. All the petitioners were born in Germany; all have lived in the United States. All returned to Germany between 1933 and 1941. All except petitioner Haupt are admittedly citizens of the German Reich, with which the United States is at war. Haupt came to this country with his parents when he was five years old; it is contended that he became a citizen of the United States by virtue of the naturalization of his parents during his minority and that he has not since lost his citizenship. The Government, however, takes the position that on attaining his majority he elected to maintain German allegiance and citizenship or in any case that he has by his conduct renounced or abandoned his United States citizenship. For reasons presently to be stated we do not find it necessary to resolve these contentions.

After the declaration of war between the United States and the German Reich, petitioners received training at a sabotage school near Berlin, Germany, where they were instructed in the use of explosives and in methods of secret writing. Thereafter petitioners, with a German citizen, Dasch, proceeded from Germany to a seaport in Occupied France, where petitioners Burger, Heinck and Quirin, together with Dasch, boarded a German submarine which proceeded across the Atlantic to Amagansett Beach on Long Island, New York. The four were there landed from the submarine in the hours of darkness, on or about June 13, 1942, carrying with them a supply of explosives, fuses and incendiary and timing devices. While landing they wore German Marine Infantry uniforms or parts of uniforms. Immediately after landing they buried their uniforms and the other articles mentioned and proceeded in civilian dress to New York City.

The remaining four petitioners at the same French port boarded another German submarine, which carried them across the Atlantic to Ponte Vedra Beach, Florida. On or about June 17, 1942, they came ashore during the hours of darkness wearing caps of the German Marine Infantry and carrying with them a supply of explosives, fuses, and incendiary and timing devices. They immediately buried their caps and the other articles mentioned and proceeded in civilian dress to Jacksonville, Florida, and thence to various points in the United States. All were taken into custody in New York or Chicago by agents of the Federal Bureau of Investigation. All had received instructions in Germany from an officer of the German High Command to destroy war industries and war facilities in the United States, for which they or their relatives in Germany were to receive salary payments from the German Government. They also had been paid by the German Government during their course of training at the sabotage school and had received substantial sums in United States currency, which were in their possession when arrested. The currency had been handed to them by an officer of the German High Command, who had instructed them to wear their German uniforms while landing in the United States.

The President, as President and Commander in Chief of the Army and Navy, by Order of July 2, 1942, appointed a Military Commission and directed it to try